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November 23, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Libertelli:

In this letter, Cbeyond Communications provides further information for the Commission's consideration in the above-captioned proceeding concerning unbundled access to DS-1 loops and SBC's recently initiated policy of rejecting CLEC orders for DS-1 UNEs based on "no facilities."

CLECs Are Impaired Without Access to DS-1 UNEs

Cbeyond and other commenters have provided extensive information in the record of this proceeding demonstrating that they are impaired in their ability to provide service without unbundled access to ILEC DS-1 loops.[1] It is not feasible for Cbeyond or competitive facilities providers to construct loops. The Commission has estimated that the cost of constructing loops is $46,680 per mile,[2] and other estimates are far higher.[3] Cbeyond's typical customer is a small business located in a lower density retail or office environment such as a small shopping mall with a need for six lines. There is no economic or practical way that Cbeyond or other providers could construct loops to serve these customers. Therefore, there are no competitive alternatives to unbundled access to ILEC DS-1 loops, or loops in general, that would permit Cbeyond to serve its customers.

Cbeyond submits that the Commission's analysis in the *UNE Remand Order* of the need for unbundled access to loops remains valid. Considerations of availability, ubiquity, cost, and timeliness mandate unbundling of loops. Thus, there is no competitive wholesale market for loops. The ILECs are literally the only game in town when it comes to loop facilities. While CLECs have made substantial investments in network infrastructure, this has not translated into a large number of local loop facilities. Moreover, the cost of duplicating "last mile" facilities to a broad population of end users suggests that a wholesale market for competitive loop facilities

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1 Comments of ALTS, Cbeyond et al., CC Docket No. 01-338, at 45 – 56.

2 *UNE Remand Order*, at 1184, n. 343.

3 WorldCom Comments, CC Docket No. 96-98, filed June 11, 2001, at 10.

will not develop in the foreseeable future. The downturn in the telecommunications industry and the closing of capital markets also suggests that a competitive market for loops is far in the future.

Further, the few years since the *UNE Remand Order*, while demonstrating advances in some technologies such as wireless and cable, have still not seen development of viable alternatives to ILEC wireline services. In regard to wireless services, even with national networks, there are still gaps in coverage, and wireless still remains a supplement to wireline as opposed to a substitute. In fact, during the latter half of 2001, a number of companies offering innovative wireless services either went bankrupt or scaled back their investments in wireless alternatives to local loops.[4] Cable providers, even if they were under an obligation to provide access to CLECs, which they are not, do not extend facilities to the small business customers that Cbeyond serves.

Accordingly, the Commission should determine that ILECs must continue to make DS-1 loops available as UNEs.

SBC Has Recently Initiated An Unlawful "No Facilities" Policy

Cbeyond takes this opportunity to call to the Commission's attention SBC's newly initiated policy in SWBT territory of rejecting CLEC orders for DS-1 loop UNEs based on "no facilities." Starting in October Cbeyond experienced a steep spike in the number of DS-1 loop UNE orders rejected. From June, 2002 through September, 2002, Cbeyond's data reflects that the percentage of DS-1 loop orders rejected by SWBT in Texas was anywhere from a low of 0% to a high of 1.7%. For the month of October 2002 the percentage of DS1 loop orders rejected by SWBT in Texas was 14.5%, a significant increase over previous trends. That number continues to increase and through November 15, 2002, 25% of Cbeyond's DS-1 loop orders have been rejected due to no facilities. This level of rejected orders seriously undermines Cbeyond's and other CLECs ability to compete effectively in SWBT territory. Cbeyond and other CLECs have filed a request for emergency relief with the Texas Public Utility Commission ("TPUC") requesting that the TPUC establish temporary emergency and permanent relief from SBC's new policy. This request, a copy of which is attached to this letter, provides further information concerning the scope of SBC's new policy and the harm that it is causing to CLECs.

Cbeyond cannot stress strongly enough that SBC's new "no facilities" policy is unlawful. As discussed in Commenters' comments in this proceeding, some ILECs' "no facilities" policy is based on an erroneous reading of the Eighth Circuit's decision regarding the Commission's "superior network" rules.[5] Specifically, requiring ILECs to perform modifications to their existing networks to fill CLEC orders (such as adding line cards, multiplexers, and other electronics) is not inconsistent with the Eighth Circuit's holding that Section 251(c)(3) does not require ILECs to provide access to a "yet unbuilt superior [network]." CLECs are not requesting ILECs to build an as yet "unbuilt superior network," but instead request that ILECs undertake the placement, augmentation, modification and replacement of facilities that the

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[4] Robert E. Hall and William H. Lehr, Promoting Broadband Investment and Avoiding Monopoly, at 15 (Feb. 21, 2002).

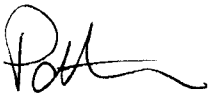
[5] Comments of ALTS *et al.* CC Docket No. 01-338, at 107-109.

ILECs provide to their own special access, DS-1, DS-3, OCN and other customers, and which is routine in the existing ILEC networks. Thus, CLECs are not seeking a superior network, but nondiscriminatory unbundled access to the existing network as required by 251(c)(3). Moreover, the Eighth Circuit specifically endorsed the Commission's determination that Section 251(c)(3) requires ILECs to make modifications to their facilities to accommodate interconnection and access to UNEs.[6]

SBC's new "no facilities" policies regarding CLEC UNE orders is discriminatory and unreasonable in violation of Section 251(c)(3) of the Act, because SBC generally will modify, reconfigure or augment electronics to provide facilities or services for its own customers and to carriers only at non-TELRIC prices (tariffed rates), but will not do so for carriers requesting UNEs. Cbeyond requests that the Commission confirm that ILECs must perform modifications such as loop conditioning, adding line cards, multiplexers, and other electronics in order to provide requesting carriers with the full "features, functions, and capabilities" of network elements,[7] and in accordance with the requirement of Section 251(c)(3) that ILECs provide nondiscriminatory access to UNEs on terms and conditions that are "just, reasonable, and nondiscriminatory."

Cbeyond supports the recent proposal of NewSouth Communications that presents specific rules and supporting justification to address the unlawful "no facilities" policies of Verizon and SBC.[8] Cbeyond urges the Commission to promptly adopt this proposal.

Sincerely,



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6 *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 813 (8th Cir. 1997), appealed on other grounds, 119 S.Ct. 721 (1999).

7 47 U.S.C. 153(29).

8 *See* Letter from Jake E. Jennings, NewSouth Communications to Christopher Libertelli, CC Docket No. 01-338, filed November 6, 2002.

cc: Christopher Libertelli
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Jordan Goldstein
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November 22, 2002

Honorable D. Diane Parker
Arbitration Projects Manager
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, TX 78711

RE: Docket No. _____: *Joint CLEC Complaint For Post-Interconnection Dispute Resolution With Southwestern Bell Telephone, L.P. And Request For Interim Ruling Regarding DS1 UNE Loop Provisioning Issues*

Dear Judge Parker:

Attached is the Joint CLEC Complaint For Post-Interconnection Dispute Resolution With Southwestern Bell Telephone, L.P. And Request For Interim Ruling Regarding DS1 UNE Loop Provisioning Issues (the "Complaint") filed today.

The Complaint includes a request for interim ruling pursuant to P.U.C. PROC. R. 22.328, which calls for a hearing on interim relief "within three business days of the filing of a complaint and request for interim ruling." In light of the upcoming Thanksgiving holiday, the Complainants request that the three business day requirement be waived for good cause, provided that the hearing can be set during the week of December 2, 2002.

Counsel for the Complainants has contacted counsel for Southwestern Bell Telephone, L.P. ("SWBT") to ascertain whether the parties can establish an agreed date for the interim relief hearing during the week of December 2. SWBT's counsel was not able to commit to a hearing date today, and the parties plan to discuss the issue again on Monday, November 25. If the parties are unable to reach an agreement on the hearing date, the Complainants request that the interim relief hearing be scheduled for Tuesday, December 3 or Wednesday, December 4, 2002.

Thank you for your attention to this matter.

Sincerely,

Bill Magness

Co-Counsel for:
Allegiance Telecom of Texas, Inc.
Birch Telecom of Texas, LTD, LLP
Capital Telecommunications, Inc.
Cbeyond Communications of Texas, L.P.
El Paso Networks, LLC
Logix Communications
NTS Communications, Inc.
Tex-Link Communications, Inc.
XO Texas, Inc.
Xspedius Management Company. Switched Services LLC

CC: Southwestern Bell Telephone, LP

NOVEMBER 22, 2002

DOCKET NO. _____

JOINT CLEC COMPLAINT FOR POST-INTERCONNECTION DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE, L.P. AND REQUEST FOR INTERIM RULING REGARDING DS1 UNE LOOP PROVISIONING ISSUES	§	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

JOINT COMPLAINT AND REQUEST FOR INTERIM RULING OF ALLEGIANCE TELECOM OF TEXAS, INC., BIRCH TELECOM OF TEXAS, LTD, LLP, CAPITAL TELECOMMUNICATIONS, INC., CBEYOND COMMUNICATIONS OF TEXAS, L.P. EL PASO NETWORKS, LLC, LOGIX COMMUNICATIONS, NTS COMMUNICATIONS, INC., TEX-LINK COMMUNICATIONS, INC., XO TEXAS, INC. AND XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC FOR POST-INTERCONNECTION AGREEMENT DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE, L.P. REGARDING DS1 UNE LOOP PROVISIONING ISSUES

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ATTACHMENTS:

1. List of Parties
2. SBC/Southwestern Bell "UNE DS1 INTERIM PROCEDURES," dated October 7, 2002
3. SBC/Ameritech Accessible Letter No. CLECAM00-153 (October 27, 2000)
4. Affidavits:
   Best - Allegiance Telecom of Texas, Inc.;
   Samson and Sauder - Birch Telecom of Texas, LTD, LLP;
   Dickson - Capital Telecommunications, Inc.;
   Robinson - Cbeyond Communications of Texas, L.P.;
   Manias - El Paso Networks, LLC;
   Taylor - Logix Communications;
   Sarchet - NTS Communications, Inc.;
   Land - Tex-Link Communications, Inc.;
   Krabill - XO Texas, Inc.; and
   Gallagher - Xspedius Management Co. Switched Services, LLC.

DOCKET NO. _____

JOINT CLEC COMPLAINT FOR POST-INTERCONNECTION DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE, L.P. AND REQUEST FOR INTERIM RULING REGARDING DS1 UNE LOOP PROVISIONING ISSUES	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

JOINT COMPLAINT AND REQUEST FOR INTERIM RULING OF ALLEGIANCE TELECOM OF TEXAS, INC., BIRCH TELECOM OF TEXAS, LTD, LLP, CAPITAL TELECOMMUNICATIONS, INC., CBEYOND COMMUNICATIONS OF TEXAS, L.P. EL PASO NETWORKS, LLC, LOGIX COMMUNICATIONS, NTS COMMUNICATIONS, INC., TEX-LINK COMMUNICATIONS, INC., XO TEXAS, INC. AND XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC FOR POST-INTERCONNECTION AGREEMENT DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE, L.P. REGARDING DS1 UNE LOOP PROVISIONING ISSUES

COME NOW Allegiance Telecom of Texas, Inc., Birch Telecom of Texas, LTD, LLP, Capital Telecommunications, Inc., Cbeyond Communications of Texas, L.P., El Paso Networks, LLC, Logix Communications, NTS Communications, Inc., Tex-Link Communications, Inc., XO Texas, Inc., and Xspedius Management Co. Switched Services, LLC. (collectively, the "CLEC Coalition," or "Complainants") and file this complaint for post-interconnection dispute resolution with Southwestern Bell Telephone, L.P. ("SWBT") pursuant to P.U.C. PROC. R. 22.326, and request for interim ruling pursuant to P.U.C. PROC. R. 22.328. The Complainants' and SWBT's contact information is provided, for purposes of P.U.C. PROC. R. 22.326(a)(1)(A), as Attachment 1 to this Complaint.

In this complaint, the CLEC Coalition requests that the Commission rule that SWBT's new policy -- by which it refuses to provision CLEC requests for UNEs based on "no facilities" -- violates the nondiscrimination requirements in federal and Texas law, violates the Interconnection Agreements between SWBT and each complainant CLEC, and violates the

commitments SWBT made to obtain authority to provide in-region interLATA services. To remedy the harm these violations have caused, Complainants request reimbursement of the sums they paid associated with obtaining special access circuits from SWBT when SWBT illegally claimed no facilities were available to fulfill DS1 UNE orders, and request that SWBT be required to convert special access orders to DS1 UNE loops immediately and/or process the DS1 UNE loop orders that were improperly refused. Consistent with this request, the CLEC Coalition asks that the Commission issue an interim ruling prohibiting SWBT from implementing its new policy and requiring that it continue providing DS1 UNE loops under the same process SWBT used prior to October 2002.

I. INTRODUCTION

In October 2002, SWBT unilaterally imposed a new provisioning procedure that has severely diminished Texas CLECs' ability to serve customers using DS1 unbundled network element ("UNE") loop facilities. Without providing notice to CLECs, SWBT began to operate under new internal procedures for conditioning and provisioning DS1 UNE loop facilities. The new procedures change SWBT's long-standing practice on when DS1 UNE loop orders will not be provisioned because, according to SWBT, "no facilities" are available to fulfill the orders.

The efficient ordering and provisioning of DS1 UNEs is essential to local competition in Texas. Many CLECs use DS1 loops to connect CLEC facilities to customer premises. The DS1 UNE loop is critical to CLECs' ability to offer, for example, integrated voice and data products and other broadband products to customers at a competitive price. In the segments of the local service market in Texas where many CLECs are experiencing the most success, the DS1 UNE is a critical component of CLEC business plans. Without access to a cost-based DS1 UNE, CLECs

cannot compete in the "T-1" services market historically dominated by SWBT, and cannot continue their efforts offer broadband and voice services bundled over a DS1 UNE loop. Moreover, CLECs also cannot compete with the integrated voice and data products SWBT has recently debuted – products SWBT introduced specifically to compete with innovative CLEC offerings.

Texas CLECs felt the business impact of SWBT's abrupt and unannounced change in DS1 UNE loop provisioning immediately and dramatically. CLECs accustomed to having approximately one to five percent of their orders returned each month with Jeopardy Codes that include a SWBT explanation of "no facilities" or "lack of facilities" ("LOF") suddenly saw up to one-third of their orders returned unfulfilled for that reason. SWBT offered no explanation of the sudden increase in the rate of LOF failures and, as discussed herein, often refused to explain its new policy when CLEC representatives followed up to address the issue. Only after numerous CLECs made concerted efforts to investigate the spike in "no facilities" determinations did SWBT release a trickle of information revealing its change in procedures.

At the same time, some CLECs found that SWBT would readily provision the same circuits that were rejected as DS1 UNEs, but only if the CLEC ordered the circuits under SWBT's special access service tariff. CLECs who had committed to customers to provide service by a date certain were compelled to fulfill their commitments by using SWBT's special access service. As the Commission is aware, special access service is available only for a substantially higher price than that charged for a DS1 UNE loop, even though both provide the same network functionality. The "no facilities" problem for a UNE often appears to be no problem at all when the CLEC, or any other customer, orders the same circuit as special access.

As detailed herein, SWBT's new DS1 UNE procedures are contrary to: (a) section 251(c)(3) of the federal Telecommunications Act of 1996 ("FTA")[1] and the FCC rules implementing it; (b) the competitive safeguards of the Public Utility Regulatory Act ("PURA")[2]; and (c) SWBT's commitments to this Commission and the FCC made during the FTA § 271 process that resulted in SWBT's entry into the Texas interLATA services market. The evidence in this proceeding will demonstrate that SWBT's newly implemented restrictions on UNE provisioning should be prohibited under both federal and state law and policy.

While this dispute resolution proceeding is pending, it is extremely important that SWBT be restrained from continuing to limit access to DS1 UNEs by unilaterally imposing its new "no facilities" procedures. An interim ruling under P.U.C. Proc. R. 22.328 is necessary pending resolution of this dispute because SWBT's new procedures preclude the ability of the Complainants to provision scheduled service. When a CLEC receives a "no facilities" report from SWBT in response to its loop order, it cannot timely provision scheduled service to the customer whose service required use of the loop. The CLEC must either cancel the customer's order, or fulfill the order using SWBT's special access service. The extremely high, non-cost-based rates charged for special access, however, significantly inflate the CLEC's cost of providing service to its customer – and may make the service offering so uneconomic as to force the CLEC to cancel it. SWBT's policy, which forces CLECs to rely increasingly on special access, threatens to drive facilities-based CLECs out of the small business sector altogether. CLECs cannot offer profitable products to, for example, a five-line small business customer if its cost of service includes a special access circuit. In addition, SWBT's failure to articulate the

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[1] Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.).

[2] Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-63.063 (Vernon 2001) (PURA).

content of its procedures leave CLECs playing roulette with each DS1 UNE loop order they submit; SWBT has injected uncertainty into a business practice that is critical to the daily functioning of competition in Texas and that, prior to October 2002, was working efficiently.

The CLECs urge the Commission to issue an interim ruling that SWBT revert to the DS1 UNE provisioning practices in place prior to the implementation of the new procedures that caused the surge in provisioning failures due to "no facilities" determinations over the last six weeks. The CLECs request that SWBT be required to provision and condition DS1 UNE loops in the same manner they have been provisioned and conditioned since 1996. The interim ruling will not harm SWBT, but rather will hold SWBT to the commitments it made regarding loop provisioning at the time it was allowed to enter the interLATA market. Interim relief will permit the parties to operate under procedures that have been the "status quo" since the passage of the FTA while the Commission fully reviews the issues raised in this proceeding.

II. FACTUAL BACKGROUND AND DESCRIPTION OF EFFORTS TO RESOLVE DIFFERENCES BY NEGOTIATION

The Complainants all provide various services that rely on availability of SWBT UNE loops. In particular, the CLECs regularly order four wire loops that are conditioned to transmit the digital signals needed to provide service at DS1 signal levels. SWBT's obligation to provide DS1 UNE loops in Texas was established in the first Mega-Arbitration, and is included in the interconnection agreements entered into by all of the Complainants.[3] Since the CLECs rely on DS1 UNE loops for delivery of customer services, the process for ordering and provisioning loops is a critical business issue.

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[3] The Complainants are all parties to interconnection agreements with SWBT. El Paso Networks, LLC operates under the interconnection agreement originally approved by the Commission in Docket No. 17922 (the Waller Creek proceeding). Xspedius Management Co. Switched Services LLC operates

SWBT's DS1 UNE Loop Provisioning Procedures Before October 2002.

The procedures established by SWBT for CLEC loop ordering and provisioning have worked in essentially the same way since the DS1 UNE loop became available after the first Mega-Arbitration. Changes in the procedures primarily have involved refinements in measuring performance and communicating the status of orders. For the most part, these changes were due to commitments SWBT made to meet the FTA § 271 checklist requirement regarding provision of local loops.[4]

When a CLEC submits an order for DS1 UNE loops, it typically receives from SWBT a Firm Order Commitment ("FOC") that identifies the date when the order will be completed. If SWBT finds it will not complete the order by the due date, it reports this information to the CLEC, using Missed Reason Codes (also known as Jeopardy Codes) that explain the reasoning for the performance failure. Even if a Jeopardy Code is issued, SWBT still typically commits to completing the DS1 UNE order by a date that, while later than the CLEC expected, is still a date certain.

When SWBT responds to an order with a Jeopardy Code claiming "lack of facilities" ("LOF") or "no facilities," however, the provisioning process, for all practical purposes, grinds to a halt. SWBT does not formally "cancel" the UNE order, but it responds with a due date so far in the future that, for practical purposes, the CLEC will not be able to respond to its commitment to its customer. For example, recent "no facilities" responses from SWBT have included "due dates" of June 2003. The CLECs are unaware of any customers who are willing to

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as successor to the SWBT/e.spire agreement, which is based on the AT&T agreement approved in the Mega-Arbitration. The other Complainants are parties to the Texas 271 Agreement ("T2A").

[4] FTA § 271(c)(2)(B)(iv), item 4 of the competitive checklist, requires that a Bell Operating Company provide "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."

wait eight months for new service. SWBT's responses thus make provisioning of the DS1 UNE loop impossible on any realistic business basis. If the new "due date" is not acceptable to the CLEC, SWBT requires that the CLEC, rather than SWBT, cancel the UNE order.[5] When no facilities are available to complete a UNE order, SWBT's position is that it has no obligation to undertake "special construction" to complete the order as a UNE. In SWBT's view, the order falls out of the UNE category altogether when the order is returned LOF. SWBT contends that this relieves it of its legal and contractual obligations to timely provision the loop and charge a cost-based UNE rate for it. According to SWBT, the CLEC's only options when the order is returned as LOF are to request provisioning of the circuit through the "special request" process of the CLEC's interconnection agreement (as a "new" UNE) or to purchase the loop functionality out of the tariff.

SWBT refusal to provision DS1 UNE loop orders based on lack of facilities has not historically presented a major systemic problem for competition in Texas. CLECs recognize that occasional loop orders may be placed to locations where SWBT does not currently have facilities. CLECs have not expected SWBT to engage in construction activities such as trenching streets and pulling cable as part of the UNE ordering process. Thus, while the Complainants have experienced LOF order returns since the inception of UNE ordering and provisioning, they did not present a substantial problem for most CLECs. For example, the Complainants in this proceeding received LOF order returns on only between one and five percent of their orders during the period of April to September 2002. This low rate of LOF

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[5] Since this procedure does not result in SWBT-generated "missed due dates" under the Performance Measures ("PM") regime, the PMs will not reveal the impact of SWBT's policy change. When a CLEC is forced to resort to special access to provide scheduled service, SWBT reports, for PM purposes, that the CLEC cancelled its DS1 UNE loop order. The relevant PMs therefore do not capture the impact of SWBT's new procedures on DS1 UNE loop provisioning. This issue is discussed in more detail herein and in the accompanying Affidavit of Tad J. Sauder.

returns is consistent with what the CLECs have experienced historically. Moreover, in the past, even when LOF rejections occurred, the DS1 UNE loops typically were provisioned. Due dates were later than requested, but ultimately the UNE was put in service in a timely manner. CLECs were not given the impossible "due dates" months in the future that have been generated by SWBT's new procedures.

While CLECs expect occasional LOF order returns from the SWBT UNE ordering process, CLECs also expect that loops will be provisioned and conditioned for use as UNEs just as they would be if SWBT was using the loop to serve its own customers. The provisioning of DS1 UNE loops has always involved various types of conditioning necessary to make the loop ready to provide digital services. In fact, the FTA and FCC rules and orders (discussed in detail below) require SWBT to "take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities."[6] In compliance with these requirements, SWBT's policy – at least as communicated to CLECs since 1996 – has been to perform the modifications needed to provision a DS1 UNE loop, while rejecting for lack of facilities only in the event that no cable or copper pairs are available to fill the CLEC's order.

New Procedures Immediately Cause A Spike In SWBT Refusal to Provision Due To "No Facilities" Claims.

SWBT's DS1 UNE loop provisioning practices changed dramatically in early October 2002. CLECs ordering DS1 UNE loops began to have extremely high numbers of orders returned as LOF. As documented in the Affidavits attached to this Complaint, CLECs began to receive LOF reports for, depending on the company, 20% up to 29% of all DS1 UNE loop

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[6] *See In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas,* , CC Docket No. 00-65, Memorandum Opinion and Order, , 16 FCC Rcd 15435, ¶ 248 (rel. June 30, 200) (" *Texas 271 Order*").

orders. The affected CLECs contacted SWBT account representatives to investigate the cause of the increased LOF order returns, and some CLECs raised the issue in the CLEC Users Forum. While the CLECs received various responses, with one exception the common denominator was an evasive refusal to provide a written explanation for the accelerated rate of LOF returns.

The CLECs have found it challenging to identify the exact nature of the dispute with SWBT because SWBT account representatives and executives have given different explanations for the LOF spike to CLEC representatives. Nevertheless, two clear problems have emerged. First, SWBT asserts that there is not a problem, and has been unwilling to negotiate a solution that will address the extraordinary increase in its refusal to provision due to "no facilities.". Rather, SWBT contends that its failure to provision is legally justifiable and that there is nothing for SWBT to negotiate. In addition, SWBT has made clear that it plans to expand its new procedures affecting DS1 UNE loops to DS0 loops as well.

Second, the new internal procedure imposed by SWBT results in unprecedented restrictions on the conditioning and provisioning of DS1 UNE loops. SWBT did not announce this policy to the CLEC community, nor has it issued an Accessible Letter or other normal change management document to memorialize it. The CLECs are aware of the procedure only because of repeated requests directed to SWBT, and the fact that one CLEC was able to obtain a document from SWBT that describes the new procedure. The document, entitled "UNE DS1 Interim Procedures" is a SWBT Construction and Engineering (C&E) Method and Procedure dated October 7, 2002. It is attached to this Complaint as Attachment 2. The new procedure provides that:

> Effective immediately, all DS1 UNE requests that meet any one of the following criteria will be returned to CPC with the instructions for them to return the order to the LSC because no facilities are available and we will <u>not construct</u> facilities for UNEs.

1. Physical construction or "energizing" of copper facilities will be necessary to provide the service.
2. Turn up of a new pair gain system or premise MUX (e.g. FLM 150) will be necessary to provide the service.
3. Placement and splicing of a new repeater case or doubler will be necessary to provide the service.
4. Splicing of an existing repeater case or doubler will be necessary to provide the service.

While SWBT's procedure unilaterally imposes new restrictions on UNE provisioning, it also recognizes that other conditioning tasks still must be performed. "[W]e will continue," the procedure states, "to perform 'simple' rearrangement and bridged tap and load coil removal for DS1 UNEs." The unidentified author in the Construction & Engineering department opines that SWBT recovers "our costs for these modifications," and directs that DS1 UNEs in such circumstances "will be constructed in the field just as we would construct DS1s for our retail service." If the conditioning tasks include those listed in Items 1-4 above, however, the CLEC is to be told that "no facilities are available" and SWBT will not construct as it would for its own retail service.

SWBT's Procedures Distort the "No Facilities" Designation.

While the interconnection lexicon includes many terms that do not have the meaning suggested by their plain language, SWBT's new "no facilities" definition borders on the surreal. SWBT's procedure attempts to expand the "no facilities" designation to cover situations where the loop facilities are undoubtedly in place, and only standard modifications are necessary to deliver the requested service. In fact, SWBT makes clear that it is actually refusing to grant CLECs access to the facilities already in place. For example, even if a repeater case or doubler is already in place (as well as the copper loop itself), SWBT will refuse to make the splice necessary to put the loop into service. All the "facilities" needed to provide the service are in

place, yet SWBT will refuse to provision the loop order based on "no facilities" being available. SWBT's procedure lumps together situations where SWBT has no copper, fiber, or other loop facilities in the area with situations where all that is necessary to provision a DS1 UNE loop is normal make ready tasks such as turning up pair gain systems or splicing in repeater cases. Considering the amount of normal conditioning work excluded by SWBT's new procedure, it is not surprising that implementation of the procedure resulted in a substantial jump in the number of LOF order returns issued to CLECs.

As SWBT began to reveal the terms of its new DS1 UNE procedures,[7] it creatively asserted that the policy was not "new," but rather reflected an effort to implement what had always been SWBT policy. The CLECs find this characterization as disingenuous and surreal as the expanded "no facilities" designation. SWBT has been provisioning DS1 UNE loops for six years using essentially the same criteria for determining when it is appropriate to return an order as LOF. SWBT's unilateral policy change has had a material and detrimental effect on CLECs' ability to serve customers using DS1 UNE loops.

The Complainants are confident that it is the new procedure, rather than a spate of orders to "green field" locations, that has caused the spike SWBT's refusal to provision DS1 UNE loops.. This is demonstrated most clearly by SWBT's ability to rapidly substitute its high priced tariffed special access service to the same locations where it claims "no facilities" are available for DS1 UNE loops. As described in the attached affidavits of XX, some CLECs faced with LOF order returns – and with impending due dates for service to high capacity customers –

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[7] Notably, the Construction & Engineering M&P stated: "This document will be used as an interim set of guidelines for the Construction and Engineering (C&E) organization dealing with the conditioning and provisioning of DS1 UNE facilities. A final document will be issued by Product Management to cover all departments." Attachment 2, at 1. The CLECs have not received a copy of the "final document" referenced in the interim procedures. As of the date of this filing, most CLECs have not been allowed to review the interim procedures SWBT is applying to their UNE orders.

placed orders for SWBT's tariffed special access service to the same customer locations where SWBT refused the UNE orders.. SWBT was able to provision special access without a hitch. While SWBT claimed "construction" or "build out" was necessary to provision a DS1 UNE loop to a particular location, SWBT could install the same functionality via special access service within an average of five to seven business days after receipt of the special access orders. In fact, the installation intervals for the special access circuits were no longer than the average installation interval for a DS1 UNE loop.

III. REQUEST FOR INTERIM RULING

As noted above, CLEC communications with SWBT demonstrate a distinct lack of willingness to negotiate a resolution of this dispute. The CLECs have filed this Complaint because the issues involved directly and significantly affect their ability to provision scheduled service to customers. An interim ruling pending dispute resolution is therefore appropriate under P.U.C. PROC. R. 22.328(a). SWBT's new procedure, as long as it is allowed to remain in effect, imposes a discriminatory, anti-competitive restriction on the CLECs' rights to serve Texas customers using DS1 UNE loops, and will prevent CLECs from exercising their contractual rights to serve customers using UNEs. An interim ruling is essential to maintain CLECs' ability to provision UNEs while the parties' disputes are resolved.

The CLEC Coalition respectfully requests that SWBT be ordered to reinstate the DS1 UNE loop conditioning and provisioning procedures that were in practice prior to its recent institution of the "UNE DS1 Interim Procedures" reflected in SWBT's Construction and Engineering Methods and Procedures and in various communications with CLECs. If SWBT claims, as it has so far, that no policy change has occurred (and thus there is nothing to reinstate), the CLEC Coalition requests a ruling that SWBT treat "no facilities" determinations for DS1

UNE loop orders the same way it would if the order was for a SWBT retail DS1-level service or for SWBT's special access service. In addition, when a CLEC has been forced to order special access due to imposition of the new "no facilities" procedures, the CLEC should be reimbursed for all additional costs associated with ordering and using the special access circuit that would not have been incurred if the CLEC's DS1 UNE loop order had been properly fulfilled, and that the special access circuit be converted immediately and at no additional cost, for all purposes, to a DS1 UNE loop. If the CLEC did not order special access when its order was returned LOF, the CLEC should be permitted to re-submit the DS1 UNE loop order and SWBT should be required to provision it on an expedited basis.

If the Commission requires that SWBT follow this principle of parity, it would return the provisioning of DS1 UNE loops to the status quo as it was before SWBT's new process took effect. The "UNE DS1 Interim Procedures" include an interesting statement relevant to this point. The document notes that each of the UNE "DS1 services is subject to the basic design criteria we perform every day in constructing DS1s. ... From an engineering perspective, these UNEs are simply DS1s that happen to be CLEC UNEs." Up until the recent policy change, it was the CLECs' understanding that this principle governed all SWBT provisioning of DS1 UNEs. The CLECs believed that for SWBT, all DS1 orders were supposedly placed in a single pile, and were worked by SWBT personnel on a parity basis whether they were for UNEs, special access, or SWBT retail high-capacity services. This parity principle is fundamental to SWBT's compliance with federal and state law, with its interconnection agreements, and with its interLATA entry obligations regarding loop provisioning. SWBT was operating based on parity not just as a matter of practice, but because that is what the law requires.

The new procedures segregate UNE orders for special, unequal treatment with other DS1 loop orders, to the extreme detriment of the CLECs who order UNEs. Parity treatment has been replaced by an active discrimination that places new roadblocks in the path of only CLEC orders. CLECs need certainty that SWBT will meet its statutory, regulatory and contractual obligations to provide nondiscriminatory access to UNE loops. CLECs have based their business plans and designed their networks on this reasonable expectation. For SWBT to change its DS1 loop provisioning procedures now, two and one-half years after receiving interLATA authority under FTA § 271 and less than a year before the expiration of the T2A, is unconscionable and will result in irreparable harm for CLECs in Texas.

As shown by the CLECs' affidavits, SWBT's refusal to provision DS1 UNE loop orders has a devastating impact on CLECs' ability to provide service to new and existing customers. CLECs in Texas have already lost customer orders due to their inability to provision cost-based DS1 UNE loops. When SWBT returns a DS1 UNE loop order due to "no facilities," CLECs have only two choices: (1) cancel the order and resubmit it at a later date when facilities may (or may not) be available, or (2) cancel the order and resubmit it as an order for special access facilities. Both of these options significantly hurt CLECs' ability to provide timely, reliable service to their customers, at competitive rates.

Under the first option, the CLEC is put in the position of having to inform its customer that it cannot commit whether or when it can deliver service to the customer because it cannot obtain a commitment date from SWBT as to if and when a DS1 UNE loop will be available. In contrast, a customer ordering a DS1 directly from SWBT would not experience a "no facilities" problem because SWBT will build for its retail customers.

Under the second option, the CLEC may be able to obtain a special access circuit to deliver its integrated voice/high speed data product to its customer in a more timely fashion, but it is forced to pay SWBT significantly higher recurring and nonrecurring rates for the special access circuit than it would pay for a DS1 UNE. This seriously hinders CLECs' ability to offer their customers a competitively priced high capacity broadband service. In addition, the process of having to cancel the UNE order and resubmit it as a special access order significantly prolongs the provisioning intervals, resulting in customer inconvenience and frustration.

These scenarios leave no doubt that SWBT's new "no facilities" procedures will significantly decrease customers' willingness to order service from a CLEC instead of SWBT. If SWBT's UNE provisioning policies create a situation in which customers can almost always receive service faster and more reliably from SWBT, telecommunications competition in Texas will cease to exist. As SWBT offers its own version of integrated voice and data products, this problem becomes more acute. The harm suffered by CLECs cannot be repaired by monetary penalties or damages. Once customers form an opinion that a CLEC is unable to provide timely, reliable service, the CLEC's reputation and business is irreparably harmed.

SWBT will not be harmed by being required to abide by the parity-based provisioning and conditioning procedures that it has had in place since 1996. Rather, as discussed below, SWBT merely will be required to meet the commitments required by state and federal law and FCC and Commission orders and rules. If SWBT wants to argue for restrictions on UNE availability (again), CLECs should not bear the burden of SWBT's choice of tactics. While the Commission considers the merits of SWBT's latest effort to restrict UNE availability in Texas, CLECs should be allowed to continue business as usual under their interconnection agreements. Since SWBT has already acted unilaterally to alter the long-standing status quo, an interim ruling

is the only path available to prevent CLECs from being unable to provision scheduled service to Texas customers.

IV. SWBT'S NEW DS1 UNE LOOP PROCEDURES VIOLATE ITS OBLIGATIONS UNDER FEDERAL AND STATE LAW, ITS COMPLIANCE WITH THE § 271 COMPETITIVE CHECKLIST, AND THE TERMS AND CONDITIONS OF ITS INTERCONNECTION AGREEMENTS.

SWBT's new DS1 UNE loop procedure is a substantial departure from its past practices. Notably, SBC has implemented the new procedures only in the five SWBT states, where the company has already been granted interLATA authority. In the Ameritech region, as discussed below, SBC has acknowledged its obligation to perform the same routine network modifications and upgrades that in Texas now generate a "no facilities"order return. In any event, SWBT's new procedures should not be allowed to continue in effect in Texas, or any other state, because they violate SWBT's legal obligations to provide nondiscriminatory access to UNEs generally and, in particular, to unbundled local loops.

As the Commission considers the legal defects of SWBT's new procedures described in the following section, the CLEC Coalition urges that the Commission not lose sight of the disastrous policy consequences of SWBT's latest anti-UNE endeavor. SWBT's decision to limit the availability of DS1 UNE loops is nothing short of astounding as a policy matter, given that it comes concurrent with SBC's vociferous objections to availability of the UNE-Platform. At the same time SBC savages UNE-P providers for "not investing" in telecom infrastructure,[8] it also

[8] It is difficult to watch television in Texas these days without seeing SBC's attack ads, aimed at its competitors who are allegedly not "real phone companies." Most recently, SBC has begun to urge the FCC to adopt a "transition plan" that will eliminate the availability of UNE-P for business customers and charge a higher-than-retail rate for UNE-P providers serving residential customers. *See, e.g.,* SBC Memorandum of Ex Parte Communication filed with the FCC on November 19, 2002 in CC Dockets 01-338. 96-98 and 98-147.

attacks the very CLECs who have invested in their own switching facilities, by unilaterally limiting their ability to reach customers using UNE loops. The Complainants *already* own and operate telecom facilities and, yet, SWBT is attacking them by changing its long-standing parity policy related to DS1 UNE loop provisioning. Limitations on the use of one of the bedrock network elements, the UNE loop, will frustrate the very type of competition SBC claims it supports. Did SWBT really think no one would notice that its policy positions, taken together, would lead only to one end, the elimination of its CLEC competitors of every type?

A. Nondiscriminatory Access to UNEs Under Federal Law Requires SWBT to Modify its Network if Needed to Provide CLECs with DS1 UNEs in a Condition Suitable for the Provision of Service.

When Southwestern Bell provides a UNE to a CLEC, it must offer that UNE with the same capabilities, at the same level of quality, and under the same conditions, as it provides to itself when it uses that same element in providing services over its network. These duties arise under section 251(c)(3) of the FTA, which imposes a duty on ILECs to provide CLECs "nondiscriminatory access to network elements on an unbundled basis ... on rates, terms and conditions that are just, reasonable, and nondiscriminatory." Based on this statutory command, sections 51.307, 51.311 and 51.313 of the FCC's rules require ILECs to offer all requesting carriers nondiscriminatory access to UNEs. The requirement for nondiscrimination specifically applies to all the inherent features of the element,[9] the quality of the element,[10] and the terms for

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[9] 47 CFR §51.307 Duty to provide access on an unbundled basis to network elements.
(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of Sections 251 and 252 of the Act, and the Commission's rules.

access to the element.[11] Similarly, federal courts have found that under the FTA and FCC rules, ILECs must modify and upgrade their networks in order to afford CLECs nondiscriminatory access to UNEs whenever the ILEC performs the same functions for its retail customers. Thus, under the broad and unequivocal nondiscrimination requirement set forth under the FTA, SWBT has an obligation to modify its existing loop plant to afford CLECs access to DS1 UNE loops, and its new procedures plainly violate that obligation.

The requirement that ILECs provide CLECs nondiscriminatory access to UNEs means that the ILEC must make UNEs available to CLECs for the CLECs to use in providing a finished telecommunications service, on similar terms, at the same level of quality and within a similar time frame as the ILEC affords itself access to those same elements in order to provide the

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(b) The duty to provide access to unbundled network elements pursuant to Section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and Section 251(c)(2) of the Act.
(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

[10] 47 CFR §51.311 Nondiscriminatory access to unbundled network elements.
(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.
(b) Except as provided in paragraph (c) of this section, to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

[11] 47 CFR §51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.
(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.
(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to

ILEC's own customers with finished services. Under this analysis, federal law has consistently required ILECs to modify their network elements in order to allow CLECs access to the "features, functions, and capabilities" of those loops. As an example, the FCC determined that ILECs must remove load coils, bridged taps and other devices from copper loops in order to make the full functionality of the loop available to competitors.[12] The FCC has further stated that under its current rules, ILECs may not deny access to a loop UNE if there is no multiplexing equipment attached to the loop facility. Instead, the FCC found that the ILEC "cannot refuse to provision a particular loop by claiming that multiplexing equipment is absent from the facility. In that case, [the ILEC] must provide the multiplexing equipment, because the requesting carrier is entitled to a fully-functioning loop."[13]

Similarly, the Michigan PSC found, and the federal district court agreed, that an ILEC is obligated to install SONET electronics to provision a request for unbundled transport even in situations where the existing multiplexing capacity attached to the UNE was insufficient to handle the CLEC request.[14]

The Commission has had the opportunity to address these issues in the recent § 252 arbitration between El Paso Networks, LLC and SWBT. In the revised Arbitration Award, the

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the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

12 *Local Competition Order, UNE Remand Order.*

13 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, ¶ 499, n.1658 (Chief, Wireline Competition Bureau rel. July 17, 2002) ("*Virginia Arbitration Order*").

14 *WorldCom Tech., Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at *3 (Mich. P.S.C. Mar. 3, 2000) (ordering Ameritech), *aff'd, Michigan Bell Telephone v. WorldCom Tech., Inc.*, 2002 WL 99739 (Mich App. 2002); *See U.S. West Comm. Inc.*, Docket Nos. UT-003022 & UT-003040, Commission Order, 2001 WL 1672340 *12 (Wash. U.T.C. July 24, 2001) (holding that the ILEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors).

Arbitrators rejected SWBT attempts to avoid its unbundling obligation with respect to dark fiber by claiming it was not required to perform certain activities that in its view constituted impermissible construction. For example, in finding that SWBT was obligated to splice dark fiber for EPN, the arbitrators ruled as follows:

> The Arbitrators find that EPN is similarly not asking SWBT to construct additional facilities. EPN is only asking for access to fiber that is already there. The Arbitrators agree with EPN that termination does not require deployment of any new capital facilities or new construction. The Arbitrators do believe, however, that termination involves field work which SWBT already does on a daily basis. Therefore, the Arbitrators find no harm in requiring SWBT to terminate dark fiber for those facilities that are already in existence.[15]

Thus, the parity requirement of the FTA and FCC rules includes the tasks involved in performing routine network upgrades and modifications to electronics and other facilities that SWBT normally performs for its customers.[16] Therefore, if an ILEC "upgrades its own network (or would do so upon receiving a request from a ... customer), it may be required to make comparable improvements to the facilities that it provides to its competitors to ensure that they continue to receive at least the same quality of service that the [ILEC] provides to its own customers."[17] The parity requirement of § 51.311(b) already mandates that network

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[15] Docket No. 25188, Revised Arbitration Award at p. 134. See also docket No. 25188 Revised Award at p. 133 (In rejecting the SWBT argument that terminating dark fiber requires construction the Arbitrators noted that "SWBT argued that it should not be required to construct dark fiber for use as a UNE. The Arbitrators do not believe that obligating SWBT to provide UNE dark fiber as described above would require SWBT to construct dark fiber for EPN for use as a UNE. In the CoServ Arbitration Award, the Arbitrators found that terminating dark fiber does not constitute constructing new transport facilities. Additionally, the Arbitrators also found that CoServ was not asking for SWBT to construct additional facilities; CoServ was only asking for access to dark fiber in those facilities that SWBT has already deployed.") (internal citations omitted).

[16] *See, e.g., US West Communications, Inc. v. AT&T Communications of the Pacific Northwest*, Inc, 31 F.Supp.2d 839, 856 (D. Or. 1998) *rev'd and vacated in part on other grounds sub nom. US West Communications, Inc. v Hamilton,* 224 F.3d 1049 (9th Cir. 2000); *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999)

[17] 31 F.Supp.2d at 856; *see also* 46 F.Supp.2d at 1025.

modifications be made so that CLECs can obtain access to SWBT's underlying network elements at the same level of quality that SWBT provides to itself.

The Eight Circuit Opinion Vacating the FCC's Superior Network Rule Does Not Alleviate SWBT's Obligation to Modify, Improve, and Expand its Existing Network Elements

Consistent with the 8th Circuit decisions in *Iowa I*[18] and *Iowa II*,[19] the Act's nondiscrimination obligation in § 251(c)(3) does not require that ILECs construct a "superior network." However, the activities necessary to afford CLECs access to UNEs do not involve construction of a superior network. In fact, courts recognize that ILECs are required to modify or expand their networks at existing quality levels and that the construction of new facilities does not mean providing a superior network.[20] Indeed, "new facilities could be necessary just to create equivalent interconnection and access."[21] In short, SWBT is obligated to perform activities it considers "construction" in order to create equivalent access, but is not required to construct superior access.

To elaborate, although *Iowa I* and *Iowa II* vacated the FCC's superior quality rules, these decisions did not absolve ILECs from their obligation to treat CLECs in a nondiscriminatory manner and at parity, as the Act[22] and FCC rules require,[23] with respect to routine network

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18 *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 812-13 (8th Cir. July 18, 1997) ("*Iowa I*").

19 *See Iowa Utilities Board v. FCC*, 219 F.3d 744, 758 (8th Cir. July 18, 2000) ("*Iowa II*").

20 *See Iowa I* at 813 n.33; *see also US West Communications, Inc. v, Minnesota Public Utilities Commission,* 55 F.Supp.2d 968, 983 (D.Minn. Mar. 30, 1999); 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856; *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 1998 WL 1806670 *4 (W.D. Wash. 1998); *MCI Telecommunications Corp. v. US West Communications, Inc.*, 1998 WL 34004509 *4 (W.D.Wash 1998).

21 55 F.Supp.2d at 983.

22 47 U.S.C. § 251(c)(3).

23 47 C.F.R. § 51.311(a)&(b); *Local Competition Order* ¶¶ 312 (stating that Act's requirement that ILECs "'provide nondiscriminatory access to network elements on an unbundled basis' refers to the physical or logical connection to the element and the element itself.") & 313 (finding that ILECs must provide access and UNEs that are at least equal-in-quality to what the ILECs provide themselves unless it

modifications and upgrades that are needed so that CLECs can access UNEs on an equivalent basis. Although *Iowa I* stated that the Act only requires unbundled access to an ILEC's existing network, "not to a yet unbuilt superior one,"[24] this statement alone does not relieve an ILEC of its duty to perform routine network modifications and upgrades in order to make an existing network element available to the same extent as it does for itself and its customers.[25]

In fact, the decision does not suggest this at all. *Iowa I* holds that ILECs cannot be required to *substantially* alter their networks in order to provide *superior* quality interconnection or *superior* quality access to network elements.[26] Furthermore, the *Iowa I* court limited this holding and explained that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include *modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.*"[27] When the court revisited this decision in *Iowa II*, it simply reaffirmed its opinion. In doing so, the *Iowa II* court noted that its ruling was limited in its applicability because "*the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of interconnection provided.*"[28]

Hence, the crucial limitation established in the *Iowa I* and *Iowa II* decisions requires that an ILEC (in treating CLECs at parity and in a nondiscriminatory manner[29]) make those modifications to its facilities that are necessary to accommodate interconnection or access to

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is technically infeasible to do so which the ILEC must demonstrate); see also UNE Remand Order ¶¶ 490-491.

[24] *Iowa I*, 120 F.3d at 812-13.

[25] *See, e.g.*, 31 F.Supp.2d at 856; 46 F.Supp.2d at 1025.

[26] *See US WEST Communications, Inc. v. THOMS*, 1999 WL 33456553 *8 (S.D. Iowa Jan. 25, 1999) ("*US West*") (citing *Iowa I*, 120 F.3d at 813 n.33).

[27] *See Iowa I*, 120 F.3d at 813 n.33 (emphasis added) (citing First Report and Order, ¶198); *see also US West*, at *8 (noting that the Eight Circuit endorsed the FCC's statement that the obligations imposed by section 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities "to the extent necessary to accommodate interconnection or access to network elements"); 55 F.Supp.2d at 983 (same); 31 F.Supp.2d at 856 (same); 1998 WL 1806670 *4 (same); 1998 WL 34004509 *4 (same).

[28] *See Iowa II*, 219 F.3d at 758 (emphasis added).

network elements, but does not require the ILEC "to provide superior interconnection or access by substantially altering its network."[30] As the Court in *US West* found, the proper interpretation of this limitation requires that the term "necessary" be given a meaning consistent with FCC precedent.[31] Significantly, the FCC deems equipment is "necessary" for interconnection or access to unbundled network elements within the meaning of 251(c)(6) "if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements."[32] Thus, applying this FCC definition of the word "necessary" within the context of the *Iowa I* and *Iowa II* limitation means that modifications or expansions to equipment are *necessary* because a CLEC cannot obtain interconnection or access to UNEs without them.

This is the exact situation that CLECs face with respect to SWBT's new "no facilities" policy, and the *Iowa I* and *Iowa II* limitation directly applies because CLECs cannot access the associated DS1 UNE loops if SWBT does not make the same basic network modifications and upgrades for CLECs that SWBT performs for its retail customers.[33] Because these modifications

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29 *See* 47 C.F.R. § 51.311(a)&(b); *see also, e.g.,* 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856.

30 *See US West* at *8.

31 *See also US WEST* at *8 (citing Local Competition Order at ¶ 59) (concluding that the state commission's interpretation of the word "necessary" as it applied to the *Iowa I* limitation was appropriate because it tracked the FCC's definition of necessary in the context of 251(c)(6)). Subsequent to this court's decision, the FCC modified its definition of the term necessary in the *Fourth Report and Order* as discussed herein. *See Fourth Report and Order* ¶ 21.

32 *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147, Fourth Report and Order, FCC 01-204, 16 FCC Rcd 15435, ¶ 21 (rel. Aug. 8, 2001) (" *Fourth Report and Order*").

33 *See* 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856. Notably, the Sixth Circuit's recent September 30, 2002 opinion in *Michigan Bell Tel Co. v. Strand*, 2002 WL 31155092 *10 (6th Cir. Sept. 30, 2002) is inapposite and does not change this result. In *Michigan Bell,* the court found that Ameritech could price discriminate when there was no retail analogue. *Id.* In particular, the court found that because Ameritech does not provide loop conditioning to its retail customers, there was no retail analogue and thus it was not discriminatory if Ameritech assessed CLECs construction charges and did not assess its retail customers such charges. *Id.* In contrast to *Michigan Bell* where there was no retail analogue, a retail analogue exists when ILECs reject CLEC requests for UNE circuits on the basis that no facilities exist. In fact, when Verizon provides a "no facilities" response to a CLEC request for high capacity UNEs, Verizon instructs

are basic and routinely offered to ILEC retail customers, such modifications do not involve substantial alteration to an ILEC network and the ILEC may not refuse to provision UNE orders on the grounds that the request involves providing superior access. Indeed, a CLEC is not requesting that the ILEC provision network facilities that are superior in quality to that which the ILEC provides to itself or build a new, superior network because the ILEC is already and routinely performing the same functions in order to provide service to their retail customers over similar facilities. As SWBT makes clear in its new Methods and Procedures, "from an engineering perspective, these UNEs are simply DS1s that happen to be CLEC UNEs."[34] In short, these facility modifications and capacity upgrades are necessary to create equivalent, not superior, quality of interconnection or access to network elements.

Thus, in the *UNE Remand Order,* the FCC provides several examples where ILECs must construct facilities to afford CLECs access to UNEs. For instance, the FCC found that *Iowa I* allowed it to require ILECs to condition loops for DSL service, and explicitly rejected the ILEC argument that such conditioning granted competitors superior access to the ILEC network. The FCC found that loop conditioning "rather than providing the CLEC a 'superior quality' loop, in fact enables a requesting carrier to use the basic loop."[35] Similarly, the FCC rules require ILECs to construct a single point of interconnection to provide CLECs access to UNE subloops. The FCC found that "to the extent there is not currently a single point of interconnection that can be feasibly accessed by a requesting carrier, ... we require the incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers."[36]

CLECs to purchase such services out of retail tariffs. Similarly, CLECs in this proceeding purchased special access service from SWBT when their DS1 UNE loop orders were rejected due to "lack of facilities."

34 SWBT "UNE DS1 Interim Procedures." *See* Attachment 2.

35 *UNE Remand Order*, ¶ 173.

36 *UNE Remand Order*, ¶ 226

Furthermore, the FCC has recognized that ILECs must expand or modify their facilities in order to provide nondiscriminatory access. For instance, under § 224 of the FTA, ILECs must provide CLECs with nondiscriminatory access to poles, ducts, conduits or rights-of-way.[37] The FCC has found that "because [ILECs] can expand [their] capacity to suit their needs, '[t]he principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers....'"[38] In crafting its rules implementing § 224 of the FTA, the FCC interpreted the Act "to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access."[39]

This Commission has also considered the application of the *Iowa I* decision vacating the FCC's superior access rule in the EPN-SWBT interconnection agreement arbitration. In that case, the Arbitrators dismissed SWBT's objection to EPN's language that requires SWBT to take EPN's forecasts for dark fiber into account when modifying its network. The Arbitrators rejected SWBT's argument that EPN was requesting "a network that is superior in quality to that which it provides itself." Instead the Arbitrators observed that because SWBT "builds, maintains, and upgrades when necessary, its own network so that it can provision telecommunications products and services for all its customers," SWBT has "a distinct advantage in that it is able to adjust its network in a timely manner so as to satisfy its customers. EPN is asking SWBT to take its forecast into consideration so that EPN, in turn, has the same opportunity to service its customers in the same timely manner as SWBT."[40] On that basis the Arbitrators found that "SWBT shall

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37 *See* 47 U.S.C. §§ 251(b)(4) & 224(f)(1).

38 1998 WL 1806670 *4 (quoting *Local Competition Order* ¶ 1162); 1998 WL 34004509 *4 (same).

39 *Local Competition Order* ¶ 1163; *see also* 1998 WL 1806670 *4; 1998 WL 34004509 *4.

40 *Id.*

accept EPN's forecasts and give them consideration when SWBT formulates its plans to accommodate foreseeable demand."[41]

Accordingly, the FTA, the FCC's rules, applicable judicial determinations, and this Commission's consideration of the issue all recognize that SWBT must make network modifications or upgrades because such changes are necessary to accommodate CLEC access to network elements.[42] Further, SWBT's failure to do so is patent discrimination because such network modifications do not involve providing superior access to network elements in that they are routinely made to accommodate requests for services made by the ILEC's customers.

B. PURA's competitive safeguards prohibit discrimination in the provision of UNEs, and unreasonable delays in delivery of competitive services to Texas customers.

In addition to the FTA rules and requirements, SWBT also is obliged to provide nondiscriminatory interconnection and access to UNEs pursuant to several sections of PURA. SWBT's new provisioning procedures violate each of these provisions of State law. First, PURA requires, at a minimum, that SWBT unbundle its network to the extent required by the FCC.[43]

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41 *Id.*

42 Such authority is also supported by other FCC and state decisions. *See, e.g., Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, n.1658 (Chief, Wireline Competition Bureau rel. July 17, 2002) ("*Virginia Arbitration Order*") (ordering that Verizon must provide the multiplexing equipment because the requesting carrier is entitled to a fully functioning loop); *WorldCom Tech., Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at *3 (Mich. P.S.C. Mar. 3, 2000) (ordering Ameritech to install SONET electronics to provision a request for unbundled transport), *aff'd, Michigan Bell Telephone v. WorldCom Tech., Inc.*, 2002 WL 99739 (Mich App. 2002); *U.S. West Comm. Inc.*, Docket Nos. UT-003022 & UT-003040, Commission Order, 2001 WL 1672340 *12 (Wash. U.T.C. July 24, 2001) (holding that the ILEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors).

43 PURA § 60.021.

As demonstrated above, SWBT's new procedures do not comply with the unbundling obligations established by the FCC and thus also fail to meet PURA's standards.

Second, PURA provides that the Commission "shall ensure that the rates and rules of an [ILEC] ... are not unreasonably preferential, prejudicial, or discriminatory; and ... are applied equitably and consistently."[44] The new procedures for DS1 UNE loop provisioning imposed by SWBT constitute an ILEC rule that is applied in a preferential, prejudicial and discriminatory manner. SWBT provisions its own DS1 level services (including tariffed special access services) in a more favorable manner than it provisions DS1 UNE loops to CLECs. SWBT's preference for its own services discriminates against CLECs and prejudices the CLECs' ability to serve customers using UNEs.

Third, SWBT's new procedures violate the "Incumbent Local Exchange Company Requirements" set forth in PURA § 60.161. That provision provides that an ILEC may not unreasonably:

> (1) discriminate against another provider by refusing access to the local exchange;
> (2) refuse or delay an interconnection to another provider;
> (3) degrade the quality of access the company provides to another provider;
> (4) impair the speed, quality, or efficiency of a line used by another provider
> ...
> (6) refuse or delay access by a person to another provider.[45]

SWBT's DS1 UNE loop procedures violate each of these PURA provisions. The procedures discriminate against CLECs, as described above. The procedures either eliminate or delay a CLEC's ability to gain access to local exchange customers using UNEs. SWBT's refusal to perform necessary modifications that permit CLECs to provide DS1 level services using UNEs

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[44] PURA § 60.001(1) & (2).

degrades the quality of the services CLECs may offer using UNEs, and decreases the efficiency of CLEC provisioning of high capacity services. Finally, the SWBT procedures unreasonably delay customers' access to CLEC services by refusing to provision orders that, if properly fulfilled, would permit the customer to receive CLEC local service without unnecessary delay.

C. SWBT's New Procedures Contravene Its Compliance With The Loop Provisioning Requirements of the § 271 Competitive Checklist.

In its Texas 271 Order,[46] the FCC found that SWBT satisfied Item 4 of the FTA § 271 Competitive Checklist, which requires that SWBT provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[47] The FCC's and the Texas PUC's determination that SWBT satisfied Checklist Item 4 regarding provision of unbundled local loops was premised on SWBT's then current performance in provisioning DS1 UNE loops. SWBT's performance necessarily included its then current practice(s) for determining what loop conditioning would be performed as part of provisioning a DS1 UNE loop (e.g., splicing, removal of bridge taps, addition of repeaters, cable throws, etc.).

The FCC and this Commission were persuaded that SWBT met Checklist Item 4 by: (1) the terms of SWBT's T2A obligations; and (2) the level of its current performance of its obligations, as determined by the Performance Measurements ("PMs") adopted by the PUC. These measurements include PM 58 (Percent SWBT Caused Missed Due Date) and PM 60 (Percent Missed Due Dates Due to Lack Of Facilities (LOF)). As explained in detail in the accompanying Affidavit of Tad J. Sauder, neither of these measurements adequately captures SWBT's performance or the marketplace reality experienced by Texas CLECs as a result of SWBT's recent change in DS-1 loop provisioning practices.

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45 PURA § 60.161 (1)-(4) & (6).

46 *Texas 271 Order*, ¶¶ 246-330.

Performance Measurement 60, which attempts to capture the lack of facilities scenarios, fails because it only includes completed service orders in the measurement. Under the new DS-1 loop provisioning practices employed by SWBT, no completed service orders are generated in connection with these orders, so none of these instances would be captured under PM 60. Similarly, although PM 58 includes orders that are canceled after a SWBT caused missed due date, Mr. Sauder attests that SWBT has assigned either "CLEC caused" or "end user caused" Jeopardy Codes to the vast majority of his company's affected DS-1 loop orders. As such, and as Mr. Sauder concludes, if SWBT is utilizing missed due date codes (to which CLECs would have little insight) consistent with those Jeopardy Codes assigned to his company's orders, it is likely these DS-1 loop order "no facilities" occurrences are not being captured in PM 58 either.

The Performance Measurement Plan included within the T2A has been traditionally relied upon by both the FCC and this Commission to capture incidents of backsliding by SWBT in the post-271 market. However, with respect to how negatively SWBT's new DS1 UNE loop provisioning procedures impact CLECs, the very performance measurements that should reveal the impact simply do not. Rather, SWBT has masterfully designed various measurements to shield SWBT from liability for its discriminatory policies and practices regarding CLEC ordering and provisioning. Additionally, SWBT has devised away to characterize various data in such a way to exclude it from performance results. .[48] In any event, Performance Measurements will not capture, prevent, or penalize the discriminatory practices now being undertaken by SWBT. SWBT's new DS1 UNE loop provisioning procedures have resulted (immediately upon

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[47] FTA § 271(c)(2)(B)(iv).

[48] Moreover, the self-reporting aspect of the performance measurement scheme in Texas lends itself to the output of performance results skewed in the favor of the reporting party. The analysis of PM 58 and PM 60, in the context of this Complaint, is evidence of this and clearly illustrates that performance measurements are not necessarily the post-271safeguards they were expected to be

their implementation) in an extreme decline in the loop provisioning performance upon which SWBT's Texas 271 approval was based, even if that performance failure is not reflected in the relevant Performance Measurements.

The change in the way SWBT provisions DS1 loops over two years into the T2A, a change that results in significant instances of UNE loop order returns for "no facilities," violates SWBT's § 271 obligations. SWBT's unilateral alteration of its DS1 provisioning procedures has only been implemented in the five SWBT states where the company is already in the long distance market. SWBT's actions represent an obvious example of the kind of post-271 backsliding that the Texas Commission has worked strenuously to prevent.

The loop conditioning modifications SBC now refuses to perform when it provisions DS1 loops were at the time of the Texas 271 Order, and should remain, part of the normal DS1 UNE loop provisioning process. However, if SBC believes that these functions should no longer be automatically included in its provisioning of DS1 loops, it could seek approval from the PUC to offer them separately from the loop, at TELRIC based rates, in its new interconnection agreements. SWBT has not done so. Instead, it has unilaterally, and without notice to CLECs, changed its method of DS1 loop provisioning, to the extreme prejudice of CLECs.

Thus in addition to violating its FTA § 251(c)(3) and PURA obligations to provide nondiscriminatory access to UNEs, SBC's policy change constitutes a violation of its contractual obligations and its FTA §271 commitments to the FCC and Texas PUC.

D. CLECs' Interconnection Agreements with SWBT Do Not Permit SWBT to Deny CLEC Requests for UNEs Merely Because Facilities Need Some Modifications.

The CLEC Complainants are parties to interconnection agreements with SWBT that require unrestricted, nondiscriminatory access to UNEs.[49] Section 55.1 of the General Terms & Conditions attachment of the Agreements provides that SWBT will provide "incumbent LEC Network Elements to CLEC on an unbundled basis on rates, terms and conditions set forth in this Agreement that are just, reasonable, and non-discriminatory." The UNE Attachment, at section 2.4, requires SWBT to:

> provide the requested elements with all the functionality, and with at least the same quality of performance and operations systems support (ordering, provisioning, maintenance, billing and recording), that SWBT provides through its own network to its local exchange service customers receiving equivalent service, unless CLEC requests a lesser or greater quality of performance through the Special Request Process.

These provisions establish a parity standard for judging the Agreements' nondiscrimination provisions: SWBT must provide the same service quality and support to CLECs ordering UNEs as it provides for its own services.

SWBT's new DS1 UNE loop procedures fail miserably to meet the parity standard. Since SWBT implemented them, the new procedures have resulted in an enormous increase in CLEC DS1 UNE loop order returns. There are, SWBT contends, "no facilities" available for numerous CLEC services that require DS1 loop functionality. On the very same loop paths, however, there are ample facilities for SWBT to provision its own special access service, which is functionally identical to the DS1 UNE loops requested by the CLECs.

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[49] As noted above, the Complainants are parties either to the T2A, or to agreements based on the AT&T agreement approved in the Mega-Arbitration or the agreement approved in the Waller Creek arbitration. The contract provisions referenced herein and relied upon by the Complainants are exactly the same in each of the Complainants' interconnection agreements.

In addition, UNE Section 2.4 also points out the flaw in SWBT's argument that CLECs should use the Special Request process to overcome SWBT's "no facilities" determinations. As Section 2.4 states, CLECs may use the Special Request process if they desire a "lesser or greater quality of performance" than SWBT provides for itself. The Complainants are in no way seeking a lesser or greater level of DS1 performance than SWBT provides for itself over its 4-wire digital loop facilities. Rather, CLECs are seeking only the standard DS1 functionality that they have every reason to expect from a DS1 UNE loop. Until SWBT's recent change in procedures, SWBT conditioned loops as necessary to provision DS1 UNEs in a manner at parity with its own DS1-level services. The changes, rearrangements, or other modifications necessary to provision DS1 UNE loops were not (nor should they have been) considered as a revision in the "quality of performance" of the UNE. Rather, the modifications were considered merely the network changes required to condition a loop for DS1-level digital service.

The language of the Special Request section of the Agreements, Attachment UNE Section 2.22, also provides that the Special Request process is intended for "[a]ny request by a CLEC for an *additional* unbundled Network Element." DS1 UNE loops are not an *additional* UNE, but rather one of the standard UNE offerings. The Special Request process, with its extended timelines and detailed procedures, is designed to address situations where the CLEC requests a new UNE not previously available under the Agreements. It was not intended to slow down the normal provisioning process for existing UNEs, which includes the loop conditioning activities SWBT now refuses to undertake.

The Special Request process may also be used by a CLEC to seek UNEs "[w]here facilities and equipment are not available." Section 2.22. As discussed above, the new SWBT DS1 UNE loop procedures apply in many circumstances where "facilities and equipment" *are*

available, but SWBT has declared its unwillingness to modify the facilities and equipment for provision of the UNE loop. SWBT should not be permitted to bootstrap CLECs into the long and arduous Special Request process by imposing a new and nonsensical definition of what it means for facilities and equipment to be "not available." When a CLEC orders a DS1 UNE loop and the loop requires modifications, the Agreements simply do not provide that the CLEC must initiate the Special Request process to ensure that its loop is timely provisioned.

E. SWBT's New Texas DS1 UNE Loop Procedures Are In Stark Contrast to SBC's "Pre-271" Loop Modification Policies in the Ameritech States.

In October 2000, SBC's Ameritech units in Illinois, Indiana, Michigan, Ohio and Wisconsin announced, in Accessible Letter CLECAM00-153, an "Unbundled Network Element Facility Modification & Construction Policy Update" (the "SBC/Ameritech Policy," attached hereto as Attachment 3). Unlike the recently imposed Texas procedures, the SBC/Ameritech Policy was publicly announced, and included the following explicit objectives: "To ensure no discrimination between retail and wholesale customers. ... [To] significantly reduce the number of canceled CLEC UNE orders due to 'no facilities available.'"

To achieve these objectives, SBC established a policy to "make modifications and engage in construction to provision UNEs according to the following categories." The categories included "simple modifications of facilities," "complex facilities modifications," and "new build." The SBC Ameritech Policy provides that "simple" and "complex" modifications will be completed as part of UNE provisioning, i.e., orders will not be returned as LOF due to the need for such modifications. The only basis for LOF return under the Policy is if "[c]onstruction of a new telecommunications system to a physical location is required because there are no existing physical facilities in place or planned to be in place to provide telecommunications services to SBC/Ameritech retail or wholesale services." (emphasis in original)

The SBC/Ameritech Policy is strikingly different from the new SWBT DS1 UNE loop procedures. For example, the SBC/Ameritech "complex" modification category includes modifications that would result in a LOF return under the new Texas procedures. Complex modifications include: (a) "Reroute of facilities (requires engineering and physical work in field to provision order)"; (b) "Addition of electronics to provide additional capacity over an existing facility to provision a UNE element (requires engineering, ordering and physical installation of new equipment, and possible rerouting of existing retail services; (c) "placing terminal or apparatus case"; (d) "placing pair gain device"; (e) "addition and removal of repeaters." Under the new Texas procedures, if SWBT determines any one of those modifications is necessary, it would result in a LOF return of the CLEC's DS1 UNE loop order.

SWBT cannot claim that its newly identified justification for refusing to provision orders based on "no facilities" is standard in the industry. In fact, they are not even standard within SBC. In states where SBC has not yet attained interLATA authority, it appears much more willing to accommodate reasonable modification procedures to "ensure no discrimination between retail and wholesale customer" and to "significantly reduce the number of canceled CLEC UNE orders due to 'no facilities available.'" In states like Texas, where SWBT is already in the interLATA market, the company is retrenching and attempting to reverse current practices that are intended to achieve the same pro-competitive objectives. Moreover, it is important to note that the date included on SWBT's "UNE DS1 Interim Procedures" is October 7, 2002, the *day before* the expiration of the SBC Ameritech Merger Conditions. Once the Merger Conditions' calls for region-wide competitive policies expired, SWBT apparently was quick to alter its procedures in the SWBT region.

V. LIST OF DISCRETE ISSUES IN DISPUTE

The CLEC Coalition files this post-interconnection dispute resolution proceeding to resolve a single issue: whether SWBT will be permitted to continue the illegal, discriminatory imposition of its new DS1 UNE loop provisioning practices and procedures. The Complainants rely on the provisions of their interconnection agreements, and on the statutes, rules, and decisions identified above to support their requests for relief. The proceeding should address the obligations of the parties under their current interconnection agreements, not the addition of new rates, terms, or conditions related to DS1 UNE provisioning. The CLEC Coalition seeks merely to return to the status quo as it was before SWBT's unilateral shift to a discriminatory provisioning policy for DS1 UNE loops.

The interim ruling and the permanent relief requested by the CLEC Coalition are substantively the same, and can be summarized as follows. The CLEC Coalition respectfully requests an Order:

1. Requiring SWBT to immediately reinstate the DS1 UNE loop conditioning and provisioning procedures that were in practice prior to its recent institution of the "UNE DS1 Interim Procedures" reflected in SWBT's Construction and Engineering Methods and Procedures, or any other practices similar to such procedures. If SWBT claims, as it has so far, that no "policy change" has occurred (and thus there is nothing to reinstate), the CLEC Coalition requests a ruling that SWBT treat "no facilities" determinations for DS1 UNE loop orders the same way it would if the order was for a SWBT retail DS1-level service or for SWBT's special access service; and

2. Requiring that when a CLEC has ordered SWBT special access service due to imposition of the new "no facilities" procedures, the CLEC should be reimbursed for all additional costs associated with ordering and using the special access circuit that would not have been incurred if the CLEC's DS1 UNE loop order had been properly fulfilled, and that the special access circuit be converted immediately and at no additional cost, for all purposes, to a DS1 UNE loop. If the CLEC did not order special access when its DS1 UNE loop order was returned LOF, the CLEC should be permitted to re-submit the DS1 UNE loop order and SWBT should be required to provision it on an expedited basis.

VI. CONCLUSION

For all the reasons stated, Allegiance Telecom of Texas, Inc., Birch Telecom of Texas, LTd., LLP, Capital Telecommunications, Inc., Cbeyond Communications of Texas, L.P., El Paso Networks, LLC, Logix Communications, NTS Communications, Inc., Tex-Link Communications, Inc., XO Texas, Inc., and Xspedius Management Co. Switched Services, LLC. respectfully request that the Commission convene a hearing regarding their request for interim relief pursuant to P.U.C. PROC. R. 22.328, and that the Commission grant the relief requested herein and any other relief to which they are entitled.

Respectfully submitted,

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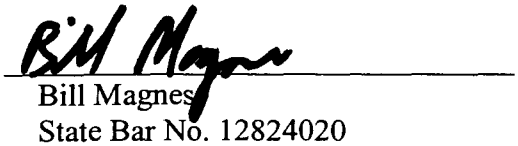
By: 
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ATTORNEYS FOR THE CLEC COALITION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Joint Complaint and Request for Interim Ruling was served on Ann E. Meuleman, General Counsel-Austin, Southwestern Bell Telephone Company, 1616 Guadalupe Street, Room 600, Austin, Texas 78701, on November 22, 2002, via hand delivery.


Bill Magness

ATTACHMENT 1

CONTACT INFORMATION PROVIDED PURSUANT TO P.U.C. PROC. R. 22.326(a)(1)(A)

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ATTACHMENT 2

SBC Southwestern Bell

Construction and Engineering Methods and Procedures

UNE DS1 Interim Procedures

Background

This document will be used as an interim set of guidelines for the Construction and Engineering (C&E) organization dealing with the conditioning and provisioning of DS1 UNE facilities. A final document will be issued by Product Management to cover all departments.

We recently discovered that DS1 UNEs are being referred to C&E daily via HI HO RMAs from the CPC. There is little doubt that we unknowingly have constructed facilities in the field for CLECS when we should have returned the request to the CPC for no facilities being available. Our current rules state that we will not construct facilities for UNE services.

DS1 UNE Circuit IDs and Definitions

There are only three (3) service codes that are subject to the DS1 UNE guidelines discussed in this document. These service codes within the circuit ID (e.g. 28 HCRT 123456) are defined as follows:

HCRC - Digital High Capacity Channel Service HC1, 1.544 Mbps, unbundled network element without test access.

HCRT - Digital High Capacity Channel Service HC1, 1.544 Mbps, unbundled network element with test access.

HCRU - Digital High Capacity Channel Service HC1, 1.544 Mbps, ONA (open network architecture), dedicated transport (generally interoffice).

Each of these DS1 services is subject to the basic design criteria we perform every day in constructing DS1s. (e.g. bridged tap and load coil removal). From an engineering perspective, these UNEs are simply DS1s that happen to be CLEC UNEs. Additionally, these DS1s can be provisioned via any of the current technologies that we use today (fiber, HDSL, HDSL2, HDSL4, FH facilities via pair gain, etc.).

SBC Southwestern Bell

Construction and Engineering Methods and Procedures

DS1 UNE Process - Return to CPC, C & E will not Construct Facilities

Effective immediately, all DS1 UNE requests that meet any one of the following criteria will be returned to the CPC with the instructions for them to return the order to the LSC because no facilities are available and we will not construct facilities for UNES.

1. Physical construction or "energizing" of copper facilities will be necessary to provide the service.
2. Turn up of a new pair gain system or premise MUX (e.g. FLM 150) will be necessary to provide the service.
3. Placement and splicing of a new repeater case or doubler will be necessary to provide the service.
4. Splicing of an existing repeater case or doubler will be necessary to provide the service.

DS1 UNE Process - C & E will Provision for CLECs

The examples below indicate that we will continue to perform "simple" rearrangement and bridged tap and load coil removal for DS1 UNEs. This is because the original cost studies for the product captured these cost as part of its basic pricing structure; therefore, we are recovering our costs for these modifications. DS1 UNEs meeting the criteria below will be constructed in the field just as we would construct DS1s for our retail service:

1. We will continue to conduct simple modifications such as LSTs or defective pair recovery to provide the service.
2. We will continue to remove bridged tap and/or load coils to provide the service.
3. We will continue to add a circuit card to an existing multiplexer, plugs to existing repeater case, and/or cards to an existing pair gain system to provide the service.

Conclusion

This document will be modified as necessary due to change in service codes and other CLEC regulatory rules. There may be individual interconnection agreements between SWB and CLECs that have language that contradicts the process identified here. In such cases the interconnection agreement will prevail.

ATTACHMENT 3

Accessible

Ameritech | SBC global network

"(BUSINESS PROCESSES) Unbundled Network Element Facility Modification & Construction Policy Update – Illinois, Indiana, Michigan, Ohio, Wisconsin"

Date: October 27, 2000

Number: **CLECAM00-153**

Contact: SBC/Ameritech Account Manager

Effective November 27, 2000, SBC/Ameritech will implement the changes to the Unbundled Network Element Facility Modification & Construction Policy that were discussed at the CLEC User Forum and state collaborative meetings[1]. (This policy's primary focus at this time is to address unbundled loops.)

Summaries of the changes are:

- Timeframe for providing notifications has been changed from 2 and 3 days to 48 and 72 hours. Note: Initial notification will be provided within 24 business hours of FOC by April 1, 2001
- The New Build Section was augmented to provide clarification
- IDLC was included in the FMOD notification process. The Policy was clarified to state that all other alternatives to provision facilities would be exhausted before any construction work is considered. A target interval for IDLC quotes of 15-21 days was established, with a required interval of 30 days.
- This explanation includes the targeted quote interval of 15 to 21 days from date of request, with an interval of 30 days
- The Facility Modification Communication Process was updated to better describe the process flow with notifications and to reflect the timeframe changes as noted above. Additionally, this section was modified to include specific reference to the notification forms, the notations/instructions on

[1] This new policy is still before various state commissions in pending proceedings and may need to be revised at a later date. Nonetheless, SBC/Ameritech are providing these improvements now rather than waiting for the proceedings to end.

these forms and all new forms. Note: The forms format has been redesigned based on CLEC input (See attachments for specific information.)

- The interval for CLECs to respond to notifications has been increased based on CLEC requests
- Ameritech will implement e-mail notification of all notification forms by November 15, 2000. (Please see below for additional information.)
- A telephone number to the Local Service Center (LSC) was added for questions on the notification forms
- Non-Typical Residential scenarios along with a copy of the quote form were added for clarification
- Performance measurements are under development and will be implemented in the 1st Quarter of 2001

To facilitate the change from manual fax notification of order status to e-mail notification, each CLEC may provide a list of e-mail address (es) that are to receive the notification forms. Each CLEC will be responsible for the accuracy of its distribution list, as well as, the distribution of the notifications to their proper service center. However, updates to the list may only be submitted quarterly. The initial information should be sent to the Account Management Team, no later than Friday, November 10. Future updates to the e-mail distribution lists should also be forwarded through your Ameritech Account Management Team.

Please refer your questions to your SBC/Ameritech Account Management Team.

Attachments

Unbundled Network Element Facility Modification & Construction Policy

The following UNE Facilities Modification and Construction Policy will replace existing UNE Special Construction Policies being used in

Illinois, Indiana, Michigan, Ohio, Wisconsin

This policy will apply except to the extent that there are existing obligations that are inconsistent with the new policy

- Statutory – Laws that may govern the modification of facilities
- Regulatory – Tariffs and or Public Service Commission orders
- Contractual – CLEC contract agreements

Objectives of Facilities Modification Policy

- To ensure no discrimination between retail and wholesale customers
- Significantly reduce the number of canceled CLEC UNE orders due "no facilities available"
- Improve ability to communicate with CLECs concerning no facilities situations and intervals to provision UNEs
- Use existing processes as much as possible
- Improve customer service where possible
- New policy is not intended to fix all existing order, provisioning and maintenance issues

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SBC/AMERITECH will make modifications and engage in construction to provision UNEs according to the following categories.

1. **Simple Modifications of facilities**

   Represents an effort above and beyond routine activities to provision a UNE

   Examples:
   - Line and Station Transfer (LST)
   - Clear Defective Pair (CDP)/ Defective Pair Recovery (DPRO)
   - Install plugs/cards (where repeater cases are in-place)
   - Wire out of limits (WOL)
   - Break connect through (BCT0)
   - Install Universal Digital Carrier (UDC)
   - Install PairGain Plus (Unbundled ISDN only)

1. **Complex Facilities Modification**

Modification of existing facilities that requires

- Design engineering
- **Equipment ordering, delivery, and installation**

Examples:

- Conditioning for ISDN and xDSL compatible loops
- Reroute of facilities (requires engineering and physical work in field to provision order)
- Addition of electronics to provide additional capacity over an existing facility to provision a UNE element (requires engineering, ordering and physical installation of new equipment, and possible rerouting of existing retail services)
- Where existing physical facilities are in place to provide telecommunications services, but are not available in a sufficient amount to provision an unbundled loop.

As described in more detail below, SBC/Ameritech will provide applicable notifications to the CLEC within 48 and 72 business hours of the firm order confirmation, except the initial notification will be provided within 24 business hours of the firm order confirmation on or before April 1, 2001.

1. **Integrated Digital Loop Carrier (IDLC)/Remote Switching Units(RSU)**

CLECs are notified through the IDLC/RSU Notification process when the requested service is provisioned through IDLC or RSU and no spare physical loops are available. This notification is provided only when all other alternatives to provision the requested UNE have been exhausted. These alternatives include looking for spare cooper facilities and making simple facility modifications. In addition, complex modifications will be pursued in an effort to provision the order. Examples of complex facility modifications that are attempted before a CLEC is notified of an IDLC/RSU situation are listed under the Associated Charges for Facility Modification by UNE section of this Policy.

In IDLC/RSU situations where no other facility modifications can be made, construction work is required to provide the requested facilities. The work will be done at an additional charge to the CLEC, upon CLEC authorization. As an alternative, Ameritech offers unbundled sub-loops consistent with existing regulations.

SBC/Ameritech will develop a quote for the necessary construction work and will provide that quote to the CLEC within a target of 15 to 21 days or a request but no later than 30 days of CLEC authorization to proceed with the quote process.

2. New Build

The New Build process in this policy is designed to address only those situations where there is no telecommunications system in place. Construction of a new telecommunications system to a physical location is required because there are **no existing physical facilities in place or planned to be in place to provide telecommunications services to SBC/Ameritech retail or wholesale services.**

Orders for Unbundled Network Elements (UNEs) where no facilities exist because of "New Build " situations will be sent back to the CLEC with a notice requesting the CLEC order services to the new location utilizing the current retail construction policies relating to new buildings, business, and residential developments

"Greenfield" situation examples:

- New building or buildings
- New business or residential development

Construction of a new building -- No telecommunications systems exist to the new building location

Therefore,

- The "Existing Facilities Modification Policy" does not apply
- The building developer (CLEC can be considered developer) or owner negotiates with SBC/Ameritech retail division to have network telecommunications systems brought into the new building
- Once telecommunications facilities into the building are available for service, CLECs can issue orders for UNEs to the new building

Construction of a new business development -- No telecommunications systems exist
Therefore,

- The "Existing Facilities Modification Policy" does not apply
- The building developer (CLEC can be considered developer) or owner negotiates with SBC/Ameritech retail division to have network telecommunications systems brought into the new business development
- Once telecommunications facilities into the development are available for service, CLECs can issue orders for UNEs to the new building development

Associated charges for facility modifications by UNE:
The following table identifies when charges will or will not apply as a result of the Facility Modification Policy:

Service	Simple Modification	Complex Modification
Voice Grade	No Separate Charge	No Separate Charge
ISDN, DSL, & DS-1 Loops	No Separate Charge	Conditioning Charges Only
Non-Typical Residential[2]	No Separate Charge	Conditioning and other Complex Modification Charges may apply
DS-3/OCN Loops and Entrance Facilities	No Separate Charge	Complex Modification Charges may apply[3]
Interoffice Facilities	No Separate Charge	Complex Modification Charges may apply[4]

Charges in IDLC/RSU Situations: In IDLC /RSU situations where no other facility modifications can be made, construction work is required to provide the requested facilities. The work will be done at an additional charge to the CLEC, upon CLEC authorization.

Conditioning Includes:
- Detaching a Loop from Bridge Taps, Loads, and Low Pass Filters
- Addition or Removal of Repeaters

Other Complex Modifications Include:
- Placing or Rearranging Cable
- Removal of Multiples (Half Taps)
- Placing Terminal or Apparatus Case
- Activating Pairs at Existing Terminal
- Placing Pair Gain Device
- Expanding Existing Electronics
- Modification of Underground or Buried Facilities

[2] Non-Typical Residential service is a request for 6+ voice grade, DSL, or ISDN loops or a request for data, i.e. DS-3, DS-1, 64K, 56K or ISDN-PRI in a residential area.

[3] This work may include the installation of new electronics to expand capacity.
[4] This work may include the installation of new electronics to expand capacity.

Policy Guidelines

- Where any additional equipment, media or other facility must be added, SBC/AMERITECH will select the medium, equipment and facility.
- Where this policy indicates there is no separate charge, SBC/AMERITECH reserves the right to review its cost studies and prices and seek recovery through revisions to its recurring prices for any costs not included in those prices.
- SBC/AMERITECH believes Simple and Complex Modification and New Build work goes beyond our obligation under the law. However, SBC/AMERITECH currently plans to implement this policy.
- All changes to this policy will follow existing change management procedures consistent with current practice utilizing the CLEC User Forum.
- This new policy is still before various state commissions in pending proceedings and may need to be revised at a later date. Nonetheless, SBC/Ameritech are providing these improvements now rather than waiting for the proceedings to end.

Performance Measures

New performance measures that relate to this policy have been developed and will be put in place with February 2001 data.

Facilities Modification Telecommunications Process

The following is an overview of the telecommunications process that will take place between a Competitive Local Exchange Carrier and SBC/Ameritech under the new UNE Facilities Modification Policy effective 11/27/00. (Process flow charts, detailed process descriptions and Forms A -E are attached.)

The overall goal of the telecommunications process guidelines:

- Establish clear, concise, and timely notifications of UNE order status to CLEC and SBC/Ameritech organizations working to provision UNE orders

1. CLEC issues order for an Unbundled Network Element (UNE) to SBC/Ameritech Local Service Center (LSC) • **LSC issues service order through company systems to Network Services** • LSC sends a Firm Order Confirmation (FOC) concerning the CLEC UNE Loop order	FOC is issued by LSC consistent with existing FOC intervals
2. Network Operations begins UNE order provisioning	Evaluations begins

processes • Network operations provisioning processes evaluate the availability of facilities • Voice Grade and Digital Loop provisioning processes • Digital Unbundled Transport provisioning processes • Network operations evaluation finds that a "No Facilities • Available" situation exists	after initial FOC
1. If a potential "no facilities" situation is determined: • LSC sends Facility Modification Delay Notification [4](Form A) containing the following message: *This notification is alerting you of a potential delay occurring for the above order(s). The order(s) may require work beyond Simple Modifications. More specific details will be provided within 72 business hours.* Delay Notification does not contain a due date	Target time to deliver Facility Modification Delay Notification is 48 business hours[5] from initial FOC
1. If facilities can be made available through a simple modification, which was determined after the CLEC received Form A, CLEC will be notified through a Facility Update Notification (Form D)	Target time to deliver Facility Update is day prior to due date
2. Network operations determines complex modification classification or that construction is needed to provision UNE	

[4] Currently all Forms A-E are sent via fax. SBC/Ameritech will be able to send these forms via email no later than November 15, 2000. SBC/Ameritech is currently unable to send these forms via EDI and does not have a date by which we will be able to do so.

[5] Business hours are defined, for purposes of this policy, as continuous hours starting Monday 8:00am CST and ending Friday 5:00pm CST, excluding holidays. This will be provided within 24 hours of FOC by April 1, 2001

Typical Residential request, instead of the LSC and will provide a form[6] that will describe the additional work required and the associated charges.	Target time to deliver Complex Facility Modification Notification is within 72 business hours of Facility Modification Delay Notification CLEC accept/reject response required in 10 business days[7] Target time to deliver Integrated Digital Loop Carrier (IDLC) and Remote Switching Unit (RSU) Notification is within 72 business

[6] Inclusion of the AM 40881 in the attachments has been included in the policy based on CLECs requests

[7] The interval for CLECs to respond to notifications has been increased based on CLECs requests

construction work can be completed at additional cost. SBC/Ameritech will provide a quote of what the additional charges will be within 30 days of receipt of this authorization. The Service Order will be held open pending receipt of the signed Form C requesting a quote for the work. **New Build Notification, Form E contains:**	hours of Facility Modification Delay Notification IDLC/RSU quotes are targeted for 15 to 21 days of request, but no later than 30 days of request CLEC required to respond within 10 business days Target time to deliver New Build Notification is within 72 business hours of Facility Modification Delay Notification
3. CLEC evaluates Facilities Modification Required Message and sends Facilities Modification Accept/Reject message to LSC If CLEC grants permission to proceed LSC sends positive confirmation to Network Operations to proceed with modifications • Network Operations implements Facilities Modification Plan • CLEC UNE order is completed on the due date based on interval established in Facilities Modification Required Message If CLEC rejects offer to modify existing facilities, LSC cancels CLEC UNE order	CLEC has 10 business days to respond after receiving the quote for charges

Modification Classifications

Facilities Modification Classifications are the physical modifications that will be completed to provision a UNE order in a no facilities available situation.

The following chart describes the Complex Modifications that may occur and contains the descriptions that will be used to communicate the work that is being physically completed to provision a UNE order. It is anticipated that there will be situations that will require multiple classifications of modification to be completed to provision an order. New classifications will be added as additional complex situations are identified.

Complex Modification

Classifications	Voice Grade	xDSL	ISDN	Data Sub-Rate (64Kbs & below)	DS-1
Remove Bridge Tap, Loads, Low Pass Filters		X	X	X	X
Add/ Remove Repeaters		X	X	X	X
Place Cable	X	X	X	X	X
Cable Rearrangement	X	X	X	X	X
Remove Multiples / (Half-Taps)		X	X	X	X
Activating Pairs at Existing Terminal	X	X	X	X	X
Placing Terminal	X	X	X	X	X
Placing Apparatus Case		X	X	X	X
Placement of Pair Gain Devices	X	X	X	X	X
Expanding Existing Electronics	X	X	X	X	
Modification of	X	X	X	X	X

Underground or Buried Facilities					

Ameritech FMOD Process

STEP	DESCRIPTION
1.0	CLEC submits LSR – BAU
1.1	Ameritech issues internal service order
1.2	Ameritech provides FOC – BAU
1.3	Ameritech service order (SO) flows thru to the Ameritech facility provisioning systems
1.4	Can the Ameritech facility provisioning systems electronically assign and design the CLEC requested service order
1.5	Can CPC/LAC obtain spare facilities?
1.6	NO – There are not facilities readily available. Can the Ameritech Facility Resolution Center (AFRC) issue a simple modification e.g. Line & Station Transfer (LST), to provide facilities?
	NO – Proceed to B
	YES – Go to 3.4
1.7	LSC sends[8] "Facility Modification Delay Notification " -Form A to CLEC within 48 business hours of FOC.
1.8	The LSC sends the "Facility Modification Delay Notification" – Form A- to the CLEC within 48 business hours[9] of FOC issuance.
1.4.1	Do the available facilities qualify for the requested service?
1.4.2	YES- If the request is for a particular service which requires specific facilities and the type of facilities required are available, the service order flows through and FOC data should be valid
	NO – Proceed to A
2.0	A- Does the existing loop facilities meet the technical requirements for the requested service with conditioning?
2.1	YES – Engineering will provide conditioning requirements to the LSC via email.
2.2	The LSC will enter the conditioning info and the revised Due Date on the "Complex Facility Modification Notification" Form B and send[1] this info to the CLEC within 72 business hours of receipt of Form A.
2.3	Does the CLEC respond to the Conditioning Notification within 10 business days?
2.4	NO – LSC will cancel the service order – the process ends
2.5	YES – Does the CLEC accept the terms for conditioning?
2.6	YES - Ameritech will supplement the service order with the new due date upon completion of the conditioning work.
	NO - go to 2.4
2.7	NO – Engineering will notify the LSC of non-compliance
2.8	LSC will enter info on the "Non-Compliance Notification" – Form C, cancel the service order and send[1] the info to the CLEC within 72 business hours of receipt of Form A.

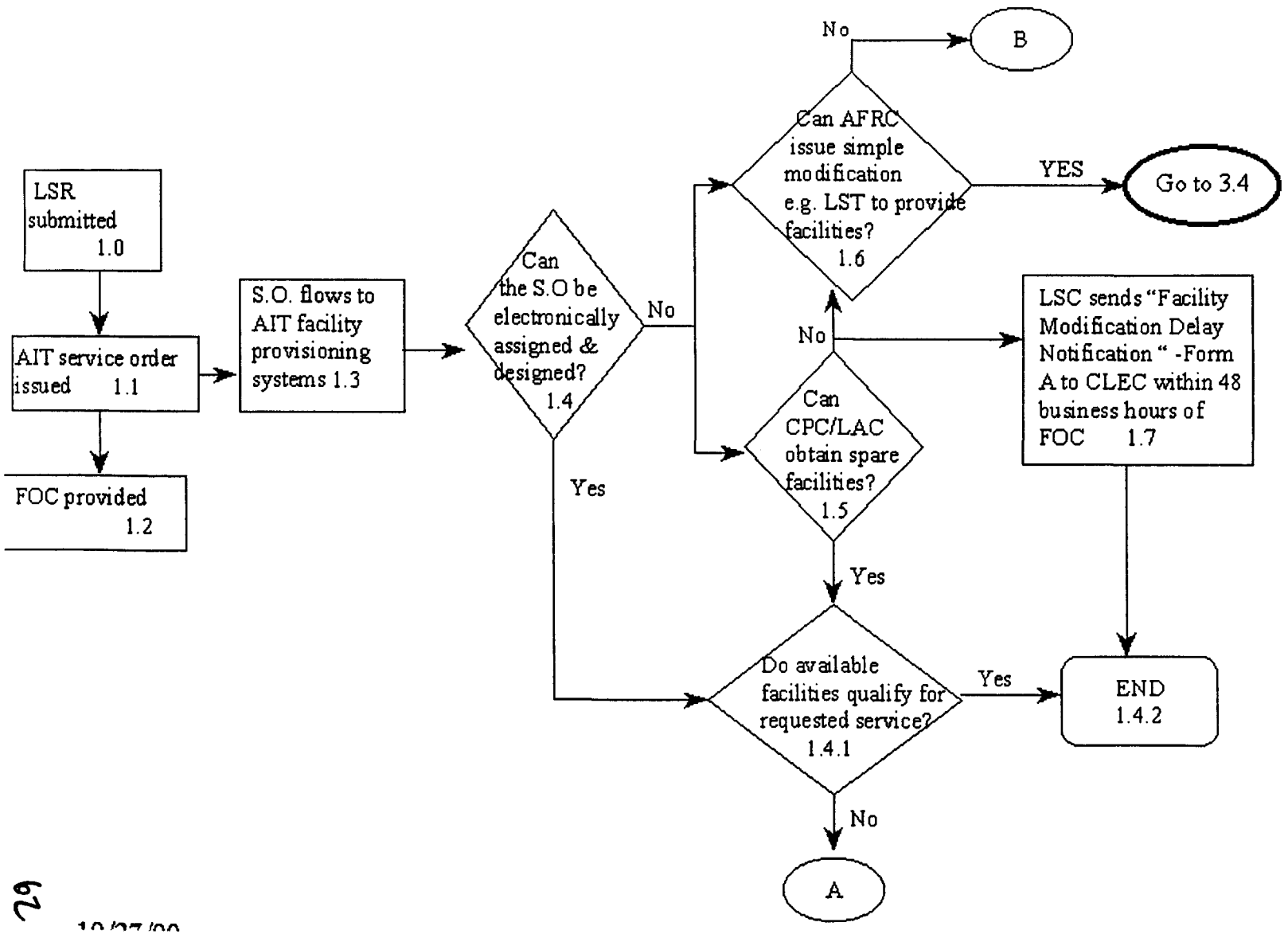
[8] Ameritech currently sends these notification via FAX. Effective 11/15/00 Ameritech will have the capability to provide these notification via email. EDI capability is yet to be determined (TBD).

[9] Business Hours are defined as normal business days excluding weekend and holidays

3.0	B –Ameritech Engineering assesses whether facilities can be made via modification
3.1	Can a simple modification be implemented to provide requested facilities?
3.2	YES – Ameritech engineering will notify AFRC to issue simple modification e.g. LST for facilities
3.3	LSC will be notified of simple modification
3.4	LSC notifies[1] the CLEC that original negotiated Due Date is OK via "Facility Update Notification" – Form D either by COB DD-1 or within business 72 hours of Form A receipt
3.5	NO – If simple modification cannot be used the engineer next determines whether the current facilities are IDLC/RSU?
3.6	YES – Engineer then evaluates whether a complex modification can be implemented to provide facilities
	NO – Proceed to C
3.7	NO – Is request for Non-Typical Residential service?
3.8	Yes – Request will be forwarded to the Customer Growth Group (CGG)
3.9	CGG will contact the CLEC, within 72 business hours of the FOC, regarding the Non-Typical Residential request, instead of the LSC and will provide form AM4408 that will describe the additional work required and the associated charges.
3.10	Since a simple modification could not be used, the engineer determines the type of complex modification work that is required. The engineer notifies the LSC of required work.
3.11	LSC inputs data provided on the "Complex Facility Modification Notification" – Form B and provides[1] to the CLEC within 72 business hours of receipt of Form A.
3.12	Does the "Complex Facility Notification" Form B require a response from the CLEC to proceed?
	YES - Go to step 2.3
	NO – FMOD process ends
4.0	Engineer sends IDLC/RSU info to the LSC
4.1	**LSC sends "IDLC and RSU Notification" – Form C to the CLEC within 72 business hours of Form A receipt**
4.2	**Has the CLEC responded the IDLC/RSU notification within 10 days of receipt providing authorization to proceed with quote?**
4.3	NO- LSC cancels service order
4.4	Does CLEC authorize quote development?
4.5	YES – LSC places the service order in a "HOLD" state
	NO – 4.3
4.6	LSC forwards quote authorization
4.7	CLEC will be provided with a cost quote and a proposed service order due date within 30 days of authorization receipt.
4.8	Does the CLEC accept the quote within 10 business days of receipt?
4.9	YES - Service order due date will be changed in the Ameritech systems and the service will be provisioned

[1] Ameritech currently sends these notification via FAX. Effective 11/15/00 Ameritech will have the capability to provide these notification via email. EDI capability is yet to be determined (TBD).

Ameritech FMOD Process



NO- go to 4.3

END

10/27/00

FMOD FORM A

Facility Modification Delay Notification

Date Sent:

Customer Name:
Fax Number:

Purchase Order Numbers: Service Order Numbers: Original Service Order Due

This notification is alerting you of a potential delay occurring for the above order(s). The order(s) may require work beyond Simple Modifications. More specific details will be provided within 72 business hours[10].

Relief:_____

For Questions Call: 1- 888 729-1458

FMOD FORM B

Complex Facility Modification Notification

Date Sent:

SBC/Ameritech is sending this form as formal notification that the existing facilities do not meet the technical specifications to provision the requested loop(s) or require other complex modifications.

REASON: ? **Conditioning of Loop Required** ? **Complex Modification Required**

Customer Name:
Fax Number:
Originator:
Purchase Order Number:
End user:
Service Order Number:

[10] Business hours are defined as continuous hours starting Monday 8:00am CST and ending Friday 5:00pm CST, excluding holidays.

Original Service Order Due Date:
Loop Type (if applicable):
Loop Length (if applicable):

? Complex Modification□ No Charges □ Charges $_____

? Conditioning – See Interconnection Agreement or applicable tariff

Conditioning or other Complex Modifications Required:

Required for Conditioning or Complex Modification with charges:

The new due date will be _____ days from receipt of acceptance*. If you would like SBC/Ameritech to proceed with this order, please sign the acceptance line below and send the completed form back to the Local Customer Service Center.

Accepted by_____ Date: _____
Declined by: _____

If the Local Customer Service Center does not receive your response in ten business days, your order will be cancelled.

If no charges apply the new Due Date will be: _____

Relief: _____

* Documents received after 3 pm, CST, will be considered the next business day.

For Questions Call: 1- 888 729-1458

Ameritech | SBC global network

FMOD FORM C

Integrated Digital Loop Carrier (IDLC) and Remote Switching Unit (RSU) Notification

Date Sent:

SBC/Ameritech is sending this form as formal notification that there are no spare physical loops to provision the requested service order. All other alternatives to provision this order have been exhausted.

Customer Name:
Fax Number:
Originator:
Purchase Order Number:
End user:
Service Order Number:
Original Service Order Due Date:

In order to proceed with this request, construction work is required to provide the necessary facilities. This construction work can be completed at additional cost[11]. SBC/Ameritech will provide a quote of what the additional charges will be within 30 days of receipt of this authorization.

If you would like SBC/Ameritech to proceed with this process, please sign the acceptance line below.

*Authorized by_____ Date: _____

[11] Subject to State Regulatory Requirements

Declined by _____ Date: _____

If the Local Customer Service Center does not receive your response within 10 business days of sending of this notification, your order will be cancelled.

*Authorization does not constitute acceptance of construction charges.

Relief:_____

For Questions Call: 1- 888 729-1458

FMOD FORM D

Facility Update Notification

Date Sent:

SBC/Ameritech is sending this form to provide additional information on the order listed below.

Customer Name:
Fax Number:
Originator:
Purchase Order Number:
End user:
Service Order Number:
Original Service Order Due Date:
New Due Date (if applicable):

☐ After further review, it has been determined that facilities are available. Your original due date will be met.

☐ After further review, it has been determined that facilities have become available. Your new due date is _____.

Relief:_____

For Questions Call: 1- 888 729-1458

FMOD
FORM E

Ameritech | SBC Global Network

NEW BUILD NOTIFICATION

Date Sent:

SBC/Ameritech is sending this form as formal notification that new construction is required because there are NO EXISTING FACILITIES.

REASON:

Customer Name:

Fax Number:

Originator:

Purchase Order Number:

End user:

Service Order Number:

Original Service Order Due Date:

Loop Type (if applicable):

Loop Length (if applicable):

Charges (if applicable):

This order will be cancelled.

SBC/Ameritech is offering to work with you to determine how to provision your order.

Or

There is an existing project planned to build facilities in this area. Expected due date for completion of this work is _____.
Relief: _____

For Questions Call: 1- 888 729-1458

An Ameritech Company

Estimate of Cost and Authority to Work
Special Construction Charge and Invoice

AM4408A
(11-95)

Customer Request Number:
Undertaking Number :

Date :
Customer ID :

----------Billing Information----------

Billing Party's Name:
Phone:
Billing Address:
Contact Name:
Phone:
Work Description &

Engineering remarks:

Expenses	Amount
Engineering Labor	$
Material Cost	$
Construction Labor	$
Contractor Cost	$
Misc. Tax	$

OSPE Representative: _____

Title: Developer Contact Manager

Phone #: _____

Ameritech of (state)
An Ameritech Company
(09/00)

Estimate of Cost and Authority for Work
Special Construction Charge and Invoice

AM 4408A

Customer Request Number:
Undertaking Number:

Date:
Customer ID:

Work Authorization:

I acknowledge that the work described under this agreement is to be completed for my benefit and at my request. I understand that according to the tariffs of Ameritech of (state[12]) on file with the (state) Commerce Commission, that it is my responsibility to pay those costs incurred by Ameritech of (state) to complete the work requested.

I understand that if changes are required at my request, I will be responsible for any additional costs incurred by Ameritech of (state) after the initial cost estimate(s) have been prepared.

I understand that I must prepay the estimated charges as stated on page (1) of this contract prior to the commencement of any work by Ameritech of (state). I also understand that if actual charges exceed the estimated costs I will not receive any additional billing unless I have pre-authorized billing due to a change requested by me or my representative(s). Prepayment should be in the form of a certified check or money order, payable to Ameritech.

_____ _____

Signature Date

_____

(Print)

For Business Customers Only

Corporations:
Agreement must be signed by an officer of the Corporation or Company and attested; or, be accompanied by a certified resolution of the Board of Directors authorizing execution by an official of the Corporation or Company.

Partnership:
Agreement must be signed by all partners.

Municipalities or Governmental Agencies:
Agreement must be accompanied by a certified resolution authorizing the official signing the agreement to execute on behalf of the Governmental Entity. The Resolution should not be certified by the same official signing the executed agreement.

Name of Corporation/Partnership/Governmental Entity: _____

_____ _____

Signature Date

_____ _____

(Print) Time

IF THIS AGREEMENT IS NOT SIGNED AND ACCEPTED WITHIN THIRTY (30) DAYS OF THE DATE ON THIS CONTRACT,
THE ESTIMATED COSTS ASSOCIATED WITH THIS CONTRACT ARE NULLIFIED AND INVALID.

[12] Illinois, Indiana, Michigan, Ohio or Wisconsin

AFFIDAVIT OF DOREEN BEST

CITY OF WASHINGTON)
)
DISTRICT OF COLUMBIA)

BEFORE ME, the undersigned authority, on this 19th day of November 2002, personally appeared Doreen Best, who, upon being duly sworn, on oath deposed and stated the following facts are true:

1. "My name is Doreen Best. I am over eighteen (18) years of age and of sound mind. I am Vice President of LEC Management for Allegiance Telecom, Inc., parent company of Allegiance Telecom of Texas, Inc. ("Allegiance"). I have been employed by Allegiance since 1999. My business address is 9201 North Central Expressway, Dallas, Texas 75231.

2. As Vice President for LEC Management, my goal is to develop and maintain good working relationships with the incumbent local exchange carriers ("ILECs") with whom Allegiance interconnects and exchanges traffic, including Southwestern Bell Telephone Company ("SWBT"). My team and I and my team identify and address operational and business issues as they arise in our dealings with SWBT and make every effort to resolve outstanding issues and disputes on an informal basis.

3. I am filing this affidavit to describe the nature and effect of the recent change in SWB T's practices for the provisioning of DS-1 UNE loops ("DS-1 loops") that led Allegiance to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. Allegiance began providing local telephone service in Texas in 1998. Currently, Allegiance serves approximately 20,000 customers in the state. One of Allegiance's most popular offerings is an integrated voice and data product provisioned over a DS1 circuit. The ability to obtain the DS1s used to provision the service as unbundled network elements is critical to Allegiance's ability to offer the service at a competitive price. Allegiance purchases DS1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. Allegiance's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A." Allegiance has also entered into an amendment with SWBT to implement the FCC's UNE Remand order.

6. In mid-October 2002, Allegiance started receiving an excessive number of jeopardy notifications from SWBT on UNE DS1 orders. The jeopardy notifications received during this time period included order returns stating justifications such as "facility shortage." "UNE

account not eligible for conversion." Or simply "please send Supp to cancel PON" (purchase order number).

7. In response to this tremendous increase in UNE DS1 order returns for lack of facilities (LOF), Allegiance went to SWBT in an attempt to find out, and hopefully eliminate, the reason for the increase. The issue was escalated to the vice president level and I personally spoke with the SBC Vice President for Account Services assigned to work with Allegiance. In response to Allegiance's inquiries, SWBT has maintained that it has not changed its UNE provisioning policies, but it is more strictly enforcing its existing policy not to build out the network to accommodate UNE orders.

8. Prior to mid-October 2002, SWBT would return only approximately 2%-3% of Allegiance's UNE DS1 orders in Texas due to LOF. Between October 15 and October 21, 2002, the returns for LOF jumped to 18% of Allegiance's UNE DS1 orders in Texas.

9. The SBC Account Services Vice President informed me that SWBT would only return DS1 UNE loop orders for LOF in the event that there was no cable or copper pairs to fill the order. SWBT does not provide the specific reason for determining these UNE DS1 loop orders due to no facilities. Upon receiving notification that a DS1 UNE loop order is returned for LOF, Allegiance representatives are forced to call the SWBT Local Service Center or Local Operations Center to try to find out the reason. For the orders returned LOF in the last two weeks of October, SWBT refused to give a reason for more than one third of the UNE DS1 returns and the reasons that SWBT gave for the remainder of the returns went far beyond no cable or defective pairs and included no repeater or repeater shelf and the need to add multiplexing or multiplexing capacity. For orders returned LOF in November, SWBT has refused to give a reason for its LOF determination.

10. Despite repeated requests, SWBT has to date not provided Allegiance anything in writing explaining its "no facilities" policy. When asked, SWBT was also unable to reference any CLEC industry document previously provided on the no facilities policy.

11. Allegiance also raised this issue at the November 6, 2002 meeting of the SBC 13 State CLEC Forum. An SBC representative at the Forum acknowledged at the meeting that SWBT had dropped the ball in communicating to CLECs that SWBT intended to more strictly enforce its existing no facilities policy and committed to provide additional information on an expedited basis. SWBT has yet to provide any additional information or explanation of its no facilities policy.

12. If SWBT does not immediately suspend this new policy and revert to its former policy for providing UNE DS1 loops, Allegiance will be irrevocably harmed. SWBT's new policy has and will have a devastating impact on Allegiance's ability to provide competitive broadband service to new and current customers in Texas. When SWBT returns Allegiance's UNE DS1 orders due to no facilities, Allegiance has to either (1) cancel the orders altogether or (2) order SWBT's much higher priced special access service.

13. Under the first option, Allegiance is forced to tell its customers that it does not know when or if it can fulfill its service commitment because it does not know when it will be able to

obtain the necessary facilities from SWBT. Option two is equally unacceptable because it means that Allegiance is forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a UNE DS1 loop, which adversely affects Allegiance's business plan, margins and ability to provide competitively-priced broadband services in Texas.

14. Under either option, Allegiance's standing in the marketplace with its customers and potential customers would be materially diminished. Under the first option, the customer would question whether Allegiance could deliver service in a timely fashion or even at all. Under the second option, Allegiance must either tell the customer that it is unable to offer the service for the price quoted or take a substantial reduction in the margin it realizes on the DS1 service.

15. Rather than lose the customers, Allegiance ordered a special access circuit in every case where SWBT rejected a UNE DS1 order due to no facilities in October. SWBT installed the special access circuits within an average of five to seven business days after receipt of the orders. Although SWBT claims that a "build out" was necessary to provision the DS1s, the installation intervals for the special access circuits were no longer than the average installation interval for a UNE DS1."

Further the affiant sayeth not.

Doreen Best
Vice President, LEC Management
Allegiance Telecom of Texas, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this 19th day of November, 2002.

Notary Public

Gladys G. Leeger
Notary Public, District of Columbia
My Commission Expires February 14, 2005

AFFIDAVIT OF TAD J. SAUDER

STATE OF MISSOURI)

COUNTY OF JACKSON)

BEFORE ME, the undersigned authority, on this 20th day of November 2002, personally appeared Tad J. ("T.J.") Sauder, who, upon being duly sworn, on oath deposed and stated the following facts are true:

1. "My name is Tad J. ("T.J.") Sauder. I am over eighteen (18) years of age and of sound mind. I have been Manager – ILEC Performance Data for Birch Telecom, Inc. since February, 2000. My business address is 2020 Baltimore Avenue, Kansas City, Missouri, 64108.

2. I have 7 years of experience in the telecommunications industry. My current responsibilities include auditing ILEC reported Performance Measurement results for accuracy and completeness. I have participated on Birch's behalf in many of the Texas PUC six-month reviews of Performance Measures. I previously spent 3 years at Andersen Consulting (now Accenture), where I was a consultant specializing in testing and implementing telecommunications Operational Support Systems. I have a Bachelor of Science in Accounting from Baker University.

3. I am filing this affidavit to describe the relationship between the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") and the Performance Measurements adopted by the Public Utility Commission of Texas and incorporated into Attachment 17 of the Texas 271 Agreement ("T2A"), approved as part of SWBT's state application for 271 authority under the Federal Telecommunications Act.

4. Although Performance Measure 58, Percent SWBT Caused Missed Due Dates, and Performance Measure 60, Percent Missed Due Dates Due to Lack of Facilities, are the two performance measurements that should have captured the missed due dates and lack of facilities problems described in the attached Complaint. A close analysis of the parameters of these measurements, however, reveals that in fact the data necessary to accurately report the problems is either not initially captured or accurately reported by these measurements

5. Performance Measures (PM) 58 and 60 ideally should report the instances in which SWBT causes a CLEC customer to experience a missed due date for provision of service or instances in which no facilities are available at an end user location, resulting in a missed due date. However, PM 58 and PM 60 do not

accomplish these goals, in part due to how the measurements were designed and partly due to the codes SWBT has assigned to DS-1 orders that have been returned for "no UNE facilities available" by SWBT.

6. While it is logical to assume that PM 60 (Percent Missed Due Dates Due to Lack of Facilities) would reflect the dramatic rise in CLEC orders for which SWBT has deemed "no facilities" are available, as outlined in the attached Complaint and supporting Affidavits, the reality is that PM 60 only captures completed service orders. Under the scenario in which Birch has had its DS-1 loop orders returned due to "no UNE facilities available," SWBT will never complete the installation for such an order, and as a result, no completed service order is ever recorded for PM 60 purposes. Therefore, SWBT's recent change in practice for provisioning DS-1 loops for CLEC customers is not accurately reflected in the PM 60 results. SWBT's implementation of its new practice consequently excludes the marketplace reality and SWBT's own performance.

7. Further, PM 58 (Percent SWBT Caused Missed Due Dates), which captures more than just due dates missed due to a lack of facilities, is the only measurement within the current Performance Measurement Plan in Texas under which canceled orders after a SWBT caused missed due date might possibly be captured. PM 58 includes orders that are canceled (unlike PM 60), provided that such orders are assigned a missed due date reason code that is defined as a SWBT caused missed due date. While Birch has little insight into which missed due dates codes are defined as SWBT caused, the Jeopardy codes that Birch has received on the majority of its DS-1 orders halted for "no UNE facilities available" are coded with CLEC or end user caused Jeopardy reasons and therefore are not being classified by SWBT as facility issues.[1] If SWBT is using missed due date codes consistent with the Jeopardy codes sent to Birch, these instances would not be captured in PM 58 either.

8. I was able to partially validate my conclusions regarding DS-1 loop orders returned to Birch for "no UNE facilities available" as having been excluded from PM 58. SWBT performance reports covering the October timeframe were not available until November 20, 2002. Although Birch had canceled several Texas DS-1 loop orders in the month of October, none of these instances appeared in SWBT performance reports for PM 58. That is, SWBT reported ***"0"*** occurrences of missed due dates due to lack of UNE facilities available for Birch for the entire month of October. Although the raw data needed to fully confirm SWBT's treatment of the Birch canceled orders will not be available for review until the first week of December, based on Birch's continued tracking of each account for which it has received a "no UNE facilities available" response from SWBT, it is evident that SWBT's reported performance under PM 58 and PM 60, is inaccurate at a minimum, but more importantly, does not reflect the reality of SWBT's performance in the marketplace. For a problem as significant as the recent

[1] *See* attached Exhibit A, electronic mail transmission between Deborah Jewell, Birch Carrier Relations Manager, Tammy Parhm , SBC Area Manager – Customer Service.

dramatic increase in "no UNE facilities available" for SWBT DS-1 loops,, it is truly disheartening that the safeguards so relied upon by the Public Utility Commission of Texas and the Federal Communications Commission to prevent SWBT's post-271 backsliding, i.e., performance measurements, are not, in this instance, working. "

Further the affiant sayeth not.

Tad J. Sauder
Manager – ILEC Performance Data
Birch Telecom, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this 20th day of November, 2002.

Notary Public

BARBARA P. FILLINGER
Notary Public-Notary Seal
State Of Missouri
Commissioned In Jackson County
My Commission Expires: June 6, 2004

SAUDER AFFIDAVIT - EXHIBIT A

-----Original Message-----
From: Jewell, Deborah
Sent: Tuesday, November 05, 2002 4:11 PM
To: 'PARHM, TAMMY (SWBT)'; Connolly, Matthew; BALL, LUKE (SWBT)
Cc: JOHNSON, BECKY (R L) (SWBT); VALDES, VINCENT (SWBT); Ivanuska, John;
JAMISON, SHERIAL K (SWBT); RODGERS, MEDERICK H (SWBT); 'Jackson, Tony'; 'Gilmore, Jerry'; Sauder, TJ
Subject: RE: Jeopardy Use for T1 Orders Affected by No Facilities

Tammy:

I'm empathetic to the OSS concerns as well as the need for SWB to be consistent among all wholesale customers; however, the jeopardy code SWB is using is inaccurate and inappropriate. In the situations noted, we're dealing with service types and accounts that qualify for conversion. The issue is that SWB is stating it can't accommodate the conversion due to a lack of facilities. It is a SWB issue. It's inappropriate, then, for SWB to assign the problem to the CLEC or it's end user. This creates an inaccurate audit trail as well as manipulates the Performance Measurements, resulting in false reporting to the PUC/FCC. If the OSS folks can't implement an appropriate jeopardy code quickly, that's fine. I understand the constraints. But SWB must use an alternative that accurately represents the situation.

-----Original Message-----
From: PARHM, TAMMY (SWBT) [mailto:tb9722@sbc.com]
Sent: Tuesday, November 05, 2002 3:57 PM
To: 'Jewell, Deborah'; Connolly, Matthew; BALL, LUKE (SWBT)
Cc: Dunsworth, Lewis; Griffin, Daniel; Lynn, Chad; 'Corrine Herron'; Sailors, Coy; Ball, William; JOHNSON, BECKY (R L) (SWBT); VALDES, VINCENT (SWBT); Ivanuska, John; JAMISON, SHERIAL K (SWBT); RODGERS, MEDERICK H (SWBT)
Subject: RE: Jeopardy Use for T1 Orders Affected by No Facilities
Importance: High

Deb,
The request for the verbiage of "no facilities available" has been identified within the Care Unit as a concern within the Operations group and the Circuit Provisioning Center. Because this verbiage is not supported by LASR, we have requested Sherron Robinson, Technical Support to challenge this issue with OSS to get this particular jeopardy code loaded. At this time, no specific date has been given on when the system update will occur.

Until that happens, the LSC must be consistent across the board and that means everyone has and will continue to receive the jeapordy notification of the following:

1)Account Not Eligible for Conversion-Send CAN supp for versions 5.0 and 5.01
2)Please send SUPP to Cancel PON for version 3.06

I know this may be heartburn for everyone, but please be mindful that changes of this nature must happen across the 13 States. I will continue to provide your team updates when I receive them.

Thanks!
Tammy Parhm
Area Manager-Customer Service
ofc. 214 268-7707
cell 214 384-8078
fax. 214 745-7868

AFFIDAVIT OF V. ALLAN SAMSON

STATE OF TEXAS)

COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this 19th day of November 2002, personally appeared V. Allan Samson, who, upon being duly sworn, on oath deposed and stated the following facts are true:

1. My name is V. Allan Samson. I am over eighteen (18) years of age and of sound mind. Currently, I am General Manager – Facilities Product Management for Birch Telecom since February 2001. My business address is 2114 Central – Suite 300, Kansas City, MO 64141.

2. I have 10 years of experience in the telecommunications industry. My current responsibilities include managing Birch Telecom's facilities product business including local voice, long distance, data, and Internet services. My organization designs, implements and manages all products and promotions for these business units. Previously, I was Director – Carrier Relations for Birch Telecom for one year where I negotiated and launched business services for Birch in the BellSouth region. Prior to that, I worked for SBC Communications, Inc. in a variety of roles for seven years. My last position at SBC was Director of Network Regulatory where I coordinated wholesale and CLEC policy for SBC and conducted CLEC negotiations. I have a Bachelors of Science in Engineering from the University of Missouri and a Master of Business Administration from Southern Methodist University in Dallas, Texas.

3. I am filing this affidavit to describe the nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") that led Birch to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. Birch began providing local telephone service in Texas in 1999. Currently, Birch serves over 40,000 customers (over 150,000 access lines) in the state. Of these, 4% currently purchase a facilities based data product (DSL, ISDN or T-1) from Birch Telecom in Texas. T-1 Services represent 11% of Birch's installed base of facilities customers, growing rapidly. Since the introduction of Birch's new, lower T-1 Internet Access pricing, Birch has been growing its T-1 customer base by 36% per month in Texas. Birch also provisions both voice and data services on DS-1 loops in Kansas and Missouri with nearly 1,000 loops in service. Finally, Birch has a softswitch in the lab with several test customers that will use a DS-1 loop to deliver voice and data to end-users. This platform is the foundation for a facilities migration of UNE-P customers.

In order to continue to provide service to its customers for both current and future service, Birch Telecom purchases DS-1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. Birch's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A."

6. Birch Telecom has purchased DS-1 loops from SWBT since March 2001. On or about October 7, 2002, Birch Telecom began noticing a significant increase in the number of its DS-1 UNE loops orders returned by SWBT for "lack of facilities" (LOF).

7. Between April 1 and October 6, 2002, the number of DS-1 UNE loop orders returned by SWBT in Texas was 1.34%. Since October 7, 2002, the number of DS-1 UNE loop orders returned by SWBT in Texas was 19.05%, an enormous increase.

8. In response to this tremendous increase in returns for LOF, Matt Connolly, Vendor Support Analyst from Birch Telecom contacted Becky Johnson, SWB LSC Customer Care Manager, via telephone at SWBT. Referencing an order that had received a no facilities response from SWBT, Mr. Connolly inquired of Ms. Johnson as to the nature and motivation behind the response. Ms. Johnson verbally replied that SWBT was now enforcing an existing policy that stated that in any situation that required SWBT to provide additional facilities in order to fill an order by Birch for a DS-1 or DS-3, that order would be returned by SWB [via a jeopardy response] with an expectation of cancellation.

9. In a further effort to seek clarification on the definition of "no facilities" as well as to understand completely the details behind SWBT's sudden "enforcement" of its "existing policy," Birch Telecom Provisioning Supervisors have made numerous and time intensive telephone calls to SWBT's Dallas LSC. Again, referencing specific orders, Birch's Provisioning Supervisors have received various verbal explanations of SWBT's policy from Ms. Becky Johnson and Mr. Luke Ball from SWBT (the latter also being a SWBT LSC Customer Care Manager).

10. In addition, Ms. Deb Jewell, Carrier Relations Manager with Birch Telecom, received the following policy explanation from Ms. Tammy Parhm, SWBT Area Manager, which is also provided in Exhibit A.

> "Please allow me to clarify the statements made by Bridgette and/or Matt Connolly. I can only assume that Bridgette is at the Arbors or Dallas location. The policy that is stated below is not a "new" policy. Construction and Engineering will be strictly adhering to the policy that UNE' DS1's and DS3's will only be provided if there are existing facilities available. If facilities are not available, a jeopardy notification will be submitted back to the CLEC for account not eligible for conversion/send cancel or supp to cancel depending on the version 5.0 or 3.0.
>
> If by chance you are adamant about getting "special construction" for the UNE service to be installed, you will be referred to your Account Manager for further resolution."

11. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 loops, Birch Telecom will be irrevocably harmed. SWBT's new policy has and will have a devastating impact on Birch Telecom's ability to provide service to new and current customers in the Texas because Birch Telecom will have to either cancel its order(s) indefinitely until facilities are "available" or order SWBT's higher priced special access service.

12. Under the first option, Birch would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. This significantly decreases customer satisfaction and makes Birch an undesirable telecommunications provider. Economically, the impact of a 20% return for LOF rate on the cost of acquisition in lost marketing and sales expenses will cripple Birch's ability to offer competitively priced services to Texas businesses. Further, the deployment of a facilities based voice network will be less economically attractive if loop availability is uncertain. Option two is equally unacceptable because it means Birch Telecom will be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 loop, seriously altering Birch Telecom's business plan and the nature of its network and hurting Birch's ability to provide competitively-priced services in the market.

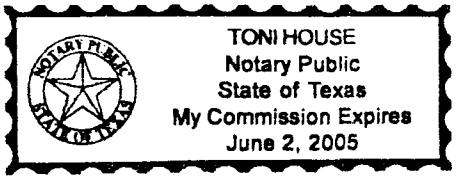
13. Under either option, Birch Telecom's standing in the marketplace with its competitors would be materially diminished. Under the first option, the customer would question whether Birch could deliver service in a timely fashion. Under the second option, the customer might be inclined to find another carrier, probably SWBT, since the customer would generally not be inclined to pay special access rates plus Birch's reasonable profit margin when it could obtain those same rates from SWBT.

14. Birch Telecom has re-ordered a special access circuit to serve every customer for which SWBT originally denied Birch's order citing "lack of facilities" when ordered as a DS-1 UNE EEL. In each instance to date, SWBT has returned a FOC confirming facilities availability and is provisioning the loop without any comment or jeopardy for facilities shortage or special construction charges. Again, Birch has had 100% of its returned for LOF DS-1 UNE loop orders quickly FOC'd and provisioned when ordered as special access. In addition, Birch has at least one Texas customer that has requested the T-1 Service from SWBT retail and quickly received confirmation from SWBT that their service was available."

Further the affiant sayeth not.

V. Allan Samson
General Manager—Facilities Product Management
Birch Telecom, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this 21st day of November, 2002.



Notary Public

EXHIBIT A
SAMSON AFFIDAVIT

From: PARHM, TAMMY (SWBT) [mailto:tb9722@sbc.com]
Sent: Wednesday, October 23, 2002 3:39 PM
To: 'Jewell, Deborah'; JACKSON, TONY L (SWBT)
Cc: RODGERS, MEDERICK H (SWBT); JAMISON, SHERIAL K (SWBT); NIEDERHAUS, CINDY A (SWBT)
Subject: RE: NET-IMS INC/T1 in San Antonio/No Facilities
Importance: High

Deb,
Please allow me to clarify the statements made by Bridgette and/or Matt Connolly. I can only assume that Bridgette is at the Arbors or Dallas location. The policy that is stated below is not a "new" policy. Construction and Engineering will be strictly adhering to the policy that UNE' DS1's and DS3's will only be provided if there are existing facilities available. If facilities are not available, a jeopardy notification will be submitted back to the CLEC for account not eligible for conversion/send cancel or supp to cancel depending on the version 5.0 or 3.0.

If by chance you are adamant about getting "special construction" for the UNE service to be installed, you will be referred to your Account Manager for further resolution.

Let me know if I can be of further assistance.

Tammy Parhm
Area Manager-Customer Service
ofc. 214 268-7707
cell 214 384-8078
fax. 214 745-7868

AFFIDAVIT OF KYLE DICKSON

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this 18th day of November 2002, personally appeared Kyle Dickson who, upon being duly sworn, on oath deposed and stated the following facts are true:

"1. My name is Kyle Dickson, I am over eighteen (18) years of age and of sound mind. I have been Vice President/General Counsel for Capital Telecommunications, Inc. ("CTI") since April 1, 2002. My business address is 8275 El Rio, Suite 110, Houston, Texas 77054.

2. I have 12 years of experience in the telecommunications industry. My current responsibilities include all industry policy, regulatory, and local exchange carrier relation issues within SBC Communications' service territory within the State of Texas.

3. I am filing this affidavit to describe nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") that led CTI to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. CTI began providing local telephone service in Texas in 1990. Currently, CTI serves approximately 5000 customers in the state. In order to provide service to its customers, CTI purchases DS-1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. CTI's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A" with the original UNE Attachment.

6. CTI has purchased DS-1 loops from SWBT since April 1,2002. On or about October 30, 2002, CTI began noticing a significant increase in the number of its DS-1 loops orders returned by SWBT for "lack of facilities" (LOF).

7. Between April 1, and October 1, 2002, the number of DS-1 loop orders returned by SWBT for LOF in Texas was 0%. Since October 1, 2002, the number of DS-1 loop orders returned LOF by SWBT in Texas was 29 %.

8. In response to this tremendous increase in returned orders LOF, Angie Lopez, Manager, Texas Provisioning from CTI contacted SWBT and was informed that there was a new policy

been implemented that prohibited SWBT employees from doing any make ready work on any DS1 UNE loop order.

9. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 loops, CTI will be irrevocably harmed. SWBT's new policy has and will have a devastating impact on CTI's ability to provide service to new and current customers in the Texas because CTI will have to either cancel its order(s) indefinitely until "facilities" are available or order SWBT's higher priced special access service.

10. Under the first option, CTI would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. Option two is equally unacceptable because it means CTI will be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 loop, seriously altering CTI's business plan and the nature of its network and hurting CTI's ability to provide competitively-priced services in the market.

11. Under either option CTI's standing in the marketplace with its competitors would be materially diminished. Under the first option, the customer would question whether CTI could deliver service in a timely fashion. Under the second option, the customer might be inclined to find another carrier, probably SWBT, since the customer would generally not be inclined to pay special access rates to a CLEC when it could obtain those same rates from SWBT.

Further the affiant sayeth not.

Name: Kyle Dickson
Title: Vice President/General Counsel
Co.: Capital Telecommunications, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this 8th day of November, 2002.

Notary Public

JO ANN FENTANES
NOTARY PUBLIC
State of Texas
Comm. Exp. 04-28-2005

AFFIDAVIT OF BROOKS A. ROBINSON

STATE OF GEORGIA)

COUNTY OF COBB)

BEFORE ME, the undersigned authority, on this 20th day of November 2002, personally appeared Brooks A. Robinson, who, upon being duly sworn, on oath deposed and stated the following facts are true:

"1. My name is Brooks A. Robinson. I am over eighteen (18) years of age and of sound mind. I have been employed by Cbeyond Communications since March 2000 and currently serve as the Vice President – Operations. My business address is 320 Interstate North Parkway, Suite 300, Atlanta, Georgia, 30339.

2. I have a BASc in Electrical Engineering from the University of Waterloo and twelve years of professional experience in the telecommunications industry. I am currently responsible for leading Cbeyond's Service Delivery organization including all aspects of operations from contract signature to service activation, including but not limited to Sales Engineering, Service Coordination, Circuit and Local Number Portability Provisioning, Service Activation and Field Services. Prior to Cbeyond, I was employed by Cambridge Strategic Management Group. During my twelve years in the telecommunications industry, I have worked for Bell Canada, Bell Northern Research, Northern Telecom and Deloitte Consulting, where I was employed in various engineering and management positions.

3. I am filing this affidavit to describe nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS1 UNE loops ("DS1 loops") that led Cbeyond to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. Cbeyond began providing local telephone service in Texas in mid-2001. As of the end of October 2002, Cbeyond serves approximately 1,200 customers in the state. In order to provide service to its customers, Cbeyond purchases DS1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner and in parity with special access circuits.

5. Cbeyond's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A." which includes the provisions of the FCC's UNE Remand Order and the SBC/Ameritech Merger Conditions.

6. Cbeyond has purchased DS1 loops from SWBT since August of 2001. Cbeyond's network in Texas, as well as other markets, is designed and built to utilize unbundled network elements purchased from SWBT, not special access facilities. As a result, until recently, Cbeyond's retail customers have been served exclusively over unbundled DS1 loops. On or about October 7, 2002, Cbeyond began noticing a significant increase in the number of its DS1 loop orders returned by SWBT for "lack of facilities" (LOF).

7. From June, 2002 through September, 2002, our data reflects that the percentage of DS1 loop orders returned by SWBT in Texas for LOF was anywhere from a low of 0% to a high of 1.7%. For the month of October 2002 the percentage of DS1 loop orders returned by SWBT in Texas was 14.5%, a significant increase over previous trends. That number continues to increase and through November 15, 2002, 25% of Cbeyond's DS1 loop orders have been returned due to no facilities.

8. In response to this tremendous increase in returned orders for LOF, Julia Strow, Vice President Government and Industry Relations requested on October 21, 2002 that David Kerr, VP of Sales at SWBT with responsibility for the Account Team that supports Cbeyond, provide an explanation of what was causing the dramatic increase in order returns due to LOF facilities. Subsequent discussions between SWBT representatives, including Mr. Kerr and Cbeyond representatives, including myself, took place on October 23rd and 28th in an attempt to gain a better understanding of what was causing the significant increase in order returns due to LOF. These discussions were primarily held via conference call with some limited exchange of information via email.

9. These discussions resulted in Mr. Kerr providing Cbeyond a written policy entitled – *SBC, Southwestern Bell, Construction and Engineering Methods and Procedures, UNE DS1 Interim Procedures*. A copy of this document dated October 7, 2002, outlining an "interim set of guidelines" that were "effective immediately" is attached hereto. Also attached is the email correspondence between SWBT and Cbeyond concerning this matter. Although SWBT and Cbeyond attempted to resolve the issue or reach some interim compromise through our discussions, we were unsuccessful in resolving the issue with SWBT.

10. As mentioned previously, Cbeyond also operates in BellSouth and Qwest territories. In the BellSouth territory, we have not to date experienced difficulty in getting the DS1 UNE loops provisioned. In Qwest, while we have experienced a higher incidence of "pending facilities" delays, our experience has been that these circuits in most cases are ultimately provisioned as UNE loops. There are two distinct differences in dealing with Qwest versus SWBT on this issue. 1) Qwest provides information to Cbeyond that provides the tools to manage our pending DS1 loop orders. In essence, we can use the information provided by Qwest, couple that with our experience over time with similar situations in Qwest and reasonably project which circuits will ultimately be provisioned. With this information we can effectively communicate with our customers and manage installation of service. 2) The stark difference is that Qwest intends to provide the facility as a UNE and will condition the loop if needed.

11. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS1 loops, Cbeyond will be irrevocably harmed. SWBT's new policy has and will have a devastating impact on Cbeyond's ability to provide service to new and current customers in Texas because Cbeyond will continue to have to either 1) cancel its order(s) indefinitely until "facilities" are available or 2) order SWBT's higher priced special access service and due to unnecessary SWBT restrictions Cbeyond would perform the necessary network work around to accommodate termination of special access facilities.

12. Under the first option, Cbeyond would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when or if it will be able to obtain the necessary UNE facilities from SWBT. Cbeyond has already lost acquired customers since the October policy was instituted and currently has numerous pending customers at risk of not getting the Cbeyond service.

13 Option two is equally unacceptable because given the fact that Cbeyond operates a UNE based network, we cannot easily accommodate special access services since SWBT does not permit Cbeyond to terminate tariffed DS1 service into UNE facilities. Not only will Cbeyond be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 loop under this option but must also incur the cost to reconfigure its network to accommodate special access services. The special access facilities in most, if not all cases, also results in a higher priced mileage sensitive special access DS1 facility because the equipment that is permissible for termination of that facility due to SWBT imposed restrictions is located at Cbeyond's tandem collocation, not at the end office collocation that serves the end user. The recent drastic and anti-competitive changes instituted by SWBT in the end hurt the small business customers in Texas because Cbeyond's ability to provide competitively priced services in the market is seriously jeopardized.

14. Because Cbeyond's ability to provide service to its customers has been compromised by the significant increase in unbundled loops that are not being provisioned, Cbeyond has been forced to make the necessary rearrangements to its network to accommodate a relatively small number of special access circuits. In early November 2002, Cbeyond ordered six special access circuits for some of the customers that had orders that had been originally returned as UNE loops due to "LOF" by SWBT. All six of these circuits were installed by SWBT as special access within 5 business days of Cbeyond submitting the orders. None of the special access orders were delayed due to SWBT facilities, nor was any extended contract term required as a precondition to provisioning.. This discriminatory practice is not acceptable to Cbeyond and Cbeyond's current process of ordering special access is an unacceptable stop gap measure.

15. Cbeyond's business is seriously impacted by SWBT's actions. Cbeyond has a very detailed and precise business plan that is predicated on achieving customer, revenue and profitability targets. Cbeyond has a tremendous track record for over-achieving its targets, however SWBT's discriminatory actions are seriously impacting our ability to meet these targets. As a result of SWBT delaying and returning our UNE DS1 orders, Cbeyond is foregoing millions of dollars of revenue. In addition, for those customers that we are required to cancel due to LOF, Cbeyond has already incurred the cost of acquiring the customer, scheduling the installation, provisioning the circuit and installing customer premise equipment to support the

Cbeyond service. This significant sunk cost with no offsetting revenue has a dramatic impact on Cbeyond's overall profitability and future success. Cbeyond's brand and credibility in the marketplace will also be materially diminished in that customers will question whether Cbeyond will be able to deliver service in a timely fashion; resulting in customers and potential customers finding another carrier, most likely SWBT, to provide service.

16. Cbeyond respectfully requests that the Commission require SWBT to reinstate its policy and practice for provisioning DS1 loops to what was in place for six years prior to the shift that took place in early October 2002. Further, Cbeyond requests that the Commission direct SWBT to permit conversion of all facilities ordered as special access to UNEs immediately and that pricing be adjusted to UNE rates for each facility retroactive to the installation date of the circuit."

Further the affiant sayeth not.

Brooks A. Robinson
Vice President - Operations
Cbeyond Communications

SUBSCRIBED AND SWORN TO BEFORE ME on this 19th day of November, 2002.

Notary Public

SBC Southwestern Bell

Construction and Engineering Methods and Procedures

UNE DS1 Interim Procedures

Background

This document will be used as an interim set of guidelines for the Construction and Engineering (C&E) organization dealing with the conditioning and provisioning of DS1 UNE facilities. A final document will be issued by Product Management to cover all departments.

We recently discovered that DS1 UNEs are being referred to C&E daily via HI HO RMAs from the CPC. There is little doubt that we unknowingly have constructed facilities in the field for CLECS when we should have returned the request to the CPC for no facilities being available. Our current rules state that we will not construct facilities for UNE services.

DS1 UNE Circuit IDs and Definitions

There are only three (3) service codes that are subject to the DS1 UNE guidelines discussed in this document. These service codes within the circuit ID (e.g. 28 HCRT 123456) are defined as follows:

HCRC - Digital High Capacity Channel Service HC1, 1.544 Mbps, unbundled network element without test access.

HCRT - Digital High Capacity Channel Service HC1, 1.544 Mbps, unbundled network element with test access.

HCRU - Digital High Capacity Channel Service HC1, 1.544 Mbps, ONA (open network architecture), dedicated transport (generally interoffice).

Each of these DS1 services is subject to the basic design criteria we perform every day in constructing DS1s. (e.g. bridged tap and load coil removal). From an engineering perspective, these UNEs are simply DS1s that happen to be CLEC UNEs. Additionally, these DS1s can be provisioned via any of the current technologies that we use today (fiber, HDSL, HDSL2, HDSL4, FH facilities via pair gain, etc.).

SBC Southwestern Bell

Construction and Engineering Methods and Procedures

DS1 UNE Process - Return to CPC, C & E will not Construct Facilities

Effective immediately, all DS1 UNE requests that meet any one of the following criteria will be returned to the CPC with the instructions for them to return the order to the LSC because no facilities are available and we will not construct facilities for UNES.

1. Physical construction or "energizing" of copper facilities will be necessary to provide the service.
2. Turn up of a new pair gain system or premise MUX (e.g. FLM 150) will be necessary to provide the service.
3. Placement and splicing of a new repeater case or doubler will be necessary to provide the service.
4. Splicing of an existing repeater case or doubler will be necessary to provide the service.

DS1 UNE Process - C & E will Provision for CLECs

The examples below indicate that we will continue to perform "simple" rearrangement and bridged tap and load coil removal for DS1 UNEs. This is because the original cost studies for the product captured these cost as part of its basic pricing structure; therefore, we are recovering our costs for these modifications. DS1 UNEs meeting the criteria below will be constructed in the field just as we would construct DS1s for our retail service:

1. We will continue to conduct simple modifications such as LSTs or defective pair recovery to provide the service.
2. We will continue to remove bridged tap and/or load coils to provide the service.
3. We will continue to add a circuit card to an existing multiplexer, plugs to existing repeater case, and/or cards to an existing pair gain system to provide the service.

Conclusion

This document will be modified as necessary due to change in service codes and other CLEC regulatory rules. There may be individual interconnection agreements between SWB and CLECs that have language that contradicts the process identified here. In such cases the interconnection agreement will prevail.

Exhibit B
Robinson Affidavit

-----Original Message-----
From: Tom Hyde <tom.hyde@Cbeyond.net>
To: Julia Strow <julia.strow@cbeyond.net>
Sent: Tue Nov 19 10:29:04 2002
Subject: FW: Additional Questions.

sbc response
-----Original Message-----
From: SOLIS, BRUCE A (SWBT) [mailto:bs2732@sbc.com]
Sent: Tuesday, November 19, 2002 10:07 AM
To: 'Tom Hyde'
Cc: SOLIS, BRUCE A (SWBT)
Subject: RE: Additional Questions.

Tom,

Per your request,

HI HO RMA- High-Cap In, Hi-Cap Out. This is the SWB system used to provision DS1 service. RMA (Request for Manual Assignment) means HI HO didn't find any facilities and a human must intervene.

Energizing of copper facilities- a cable throw or cable placement must be done to provide service

New pair gain- equipment does not exist and must be placed to provide service. DS1's do not work through pair gain so the key to this paragraph is "premise mux". Same story, if the mux does not exist build-out must occur to provide DS1

LST- Line or Station Transfer. If the assigned pair is defective then SWB will look for another pair to provision the service if one exists.

Bruce

-----Original Message-----
From: Tom Hyde [mailto:tom.hyde@Cbeyond.net]
Sent: Tuesday, November 19, 2002 8:01 AM
To: SOLIS, BRUCE A (SWBT)
Subject: Additional Questions.

Bruce -

Last month, David Kerr shared a document with some folks here regarding SBC's new policy on what will and what won't be provisioned by SBC going forward. We are continuing to see an increase in the number of orders associated with no facilities. To help us better manage our orders we need some clarification on some of the terms used in the document - I have already inquired about one but now have a couple of others after reviewing with our provisioning folks. I have highlighted the terms in the document that we need to better understand in order to determine under what conditions SBC will and won't provision DS1 circuits. Please let me know when you will be able to provide clarification - we are requesting it this week if possible.

<<Engineering Construction Flash DS1 UNES-DRAFT 10-2-022.rtf>>

Tom Hyde
Cbeyond Communications
Phone 678-424-2467
Fax 678-424-2500
Cell 770-337-4557

AFFIDAVIT OF PANTIOS MANIAS

STATE OF TEXAS)

COUNTY OF TRAVIS)

Pantios Manias, being duly sworn upon oath, deposes and states as follows:

1. "My name is Pantios Manias. I am Senior Vice President for Carrier Relations, Regulatory and Business Development for El Paso Global Networks ("EPGN"), the parent company of El Paso Networks, L.L.C. ("EPN"). Prior to joining El Paso I worked for over four years at Southwestern Bell Telephone Company ("SWBT") in Texas. I began working at SWBT in 1996 as a Manager in the Network organization. In 1997, I moved to a position as a Special Access Account Manager selling Special Access to Wireless Carriers, and in my last position with SWBT I served as a CLEC Account Manager.

2. In my position at EPGN, I am responsible for maintaining relations with the other telecommunications carriers, including incumbent LECs with whom EPN does business. For example, I am responsible for managing the negotiations of interconnection agreements and the day-to-day interaction between EPN personnel and SWBT. I am also knowledgeable about EPN's relationship with its customers and am frequently involved in negotiating deals with customers that seek to obtain telecommunications services from EPN.

3. The purpose of my affidavit is to demonstrate that if SWBT is allowed to unilaterally change its provisioning policy for DS1 UNE loops, EPN will suffer irreparable harm and be precluded from provisioning scheduled service to its customers. Namely, EPN will lose the ability to serve wholesale customers in a ubiquitous manner, as SWBT is able to do, will be unable to utilize existing facilities for DS1 UNE loops and therefore suffer irreparable damage to its business reputation by failing to provide ubiquitous and timely service, and will lose its ability to compete in a meaningful way to provide telecommunications services to customers in Texas.

4. In this affidavit, I will first discuss EPN's orders for DS1 UNE loops prior to October 7, 2002, when SWBT provisioned all of EPN's DS1 UNE orders. I will then describe the underhanded action taken to change existing policy and procedures by SWBT, fully knowing the detrimental affect this would have on the provisioning of DS1 UNE loops to CLECs as well as SWBT's attempts to hide this information from EPN. I will demonstrate the efforts EPN made to understand this change of procedure and SWBT's lack of cooperation in providing any information in writing for EPN to understand and review. I will also demonstrate the overwhelming negative impact the policy change has had on EPN's ability to compete in a cost effective manner as a provider of wholesale services in Texas. Finally, I will show that SWBT is systematically putting into play practices and procedures that force CLECs to order UNEs as special access circuits where SWBT has

internal quotas for sales including the paying of commission to its sales staff. In this section of my affidavit I will: describe how EPN submitted the orders to SWBT; show that EPN ordered the DS1 UNE loops in the same manner both prior to and after October 7, 2002, show that although SBC returned a "no facilities" for such loop when EPN ordered the same loop at the higher priced special access, SBC provisioned such loop without delay and without additional construction costs to EPN. Further, I will describe the method of provisioning DS1s in the traditional network and how provisioning of DS1 UNE loops, because of new technology, has become less expensive and easier to provision over time. Then my affidavit will show how SWBT's action precludes EPN from providing scheduled service to its wholesale customers in a cost effective manner.

5. EPN is a combined facilities-based and UNE purchasing CLEC that provides high-speed telecommunications transport services to telecommunications carriers and high-volume enterprise business users. To serve the needs of these customers, EPN has deployed a state of the art transport network in five cities in Texas: Austin, San Antonio, Dallas, Houston and Fort Worth. EPN has now completed its transport network, has collocated in most of SWBT's central offices in each of these five cities, and has connected these offices using dark fiber obtained from SWBT. EPN is now focused on attracting customers to its transport network. To reach these customers in a cost-effective manner, EPN must have access to UNEs between EPN's collocation arrangements in SWBT central offices and the customer's premises. Thus, for EPN to stay in business, unfettered access to SBC UNE loops are of the utmost importance.

6. Between April 1, 2002 and October 1, 2002, EPN submitted one thousand one hundred and nine (1,109) orders to SWBT for DS1 UNE loops. *In all cases the DS1 order was provisioned.* The only exception to this is in a few instances when the customer canceled the order or the customer premise was not ready for the DS1 UNE loop to be installed.

7. Our data further demonstrates that in forty nine (49) cases, SWBT reported "no existing facilities", including but not limited to, lack of cable pairs, lack of repeater shelves, installation of new repeater bays, installation of field repeaters (repeaters in the loop plant that are placed in apparatus cases in manholes or telephone poles), reconfiguration of multiplexing equipment or the installation of additional muxing equipment, or existing conditioned pairs. Importantly, however, whatever was needed to be done to deliver the UNE, SWBT did it as a matter of course albeit at a later date than the original due date. In these cases, SWBT provisioned the circuits after some construction or conditioning to the SWBT existing network was accomplished. *Again, in every case, the DS1 UNE loop was delivered to EPN.*

8. The important fact is that in the SWBT downstream systems, prior to October 7, 2002, the work activity and people involved in the provisioning of DS1 UNE loops were set up internally in SWBT to give CLECs parity treatment to the provisioning and installation processes given to SWBT retail and access customers as well as SBC affiliates, including ASI. SWBT was not building a superior network for CLECs, rather it was operating under existing practices to provision bandwidth services, as needed, utilizing its existing facilities. When I was working at SWBT, this was often referred to as "just in time engineering". This cost-effective practice of placing copper and fiber facilities in the

network to be used to provision services quickly when they are called for in the future with small modification to the facility has been standard operating procedure for many years at SWBT. As detailed in Docket 25188 for dark fiber, loop splicing and conditioning often occur only after an order is placed for the service. SWBT will not take CLEC forecasts into consideration when designing its network for DS1 UNE loops, therefore, SWBT must often do the necessary reconfiguration to provide the service when the LSR is sent by the CLEC. Unfortunately, by taking advantage of its unique position of "gatekeeper," SWBT is now unilaterally denying a UNE order by simply stating that no facilities exist. There is no check and balance to this denial and no means for a CLEC to review the validity of such denial.

9. The interesting statistic is that prior to October 7, 2002, EPN was told that only approximately 4% of the orders provisioned for DS1 UNE loops were in a jeopardy situation due to lack of facilities to provision the service. The jeopardy was *not* that the order would not be worked but that the order would not be worked by the requested due date. When the SWBT new policy became effective the number of DS1 UNE loops that were not available due to lack of facilities jumped to a *whopping 24%.* It's the same SWBT network, the same provisioning people, the same provisioning systems, the same "existing" facilities—how could this disparity in percentages be possible? The number of "no facilities" should be constant; the number of no facilities that are eventually provisioned should be the only factor that changes. EPN does not understand how only 4% of the orders prior to the October 7th policy change needed additional work to install the T-1 and after the policy change over 24% of the requested DS1 UNE loops needed additional work to provision the loop. Astoundingly, this change in the percentage of available, existing DS1 UNE loop facilities happened virtually overnight.

10. Prior to October 7, 2002 there was a policy in place within SWBT to provision DS1 loops in the same manner for all customers, whether access, retail or a CLEC customer. This was one of the few arenas where true parity existed within SWBT between its retail , access and CLEC customers. The term "Customer Desired Due Date" was used internally within SWBT to explain that DS1's will be provisioned utilizing existing facilities no matter what re-arrangement or conditioning was needed to such facility to provide service. . SWBT's internal policies were such that it worked to meet the due date desired by the customer—and prior to October 7th that policy was working 100% of the time for EPN. *EPN was able to practically guarantee its customer that a DS1 could be delivered.* The only issue was the actual date of delivery based on what network re-arrangement needed to be done by SWBT to deliver the service. This creates a level playing field for EPN and other CLECs who are trying to compete in Texas in the wholesale transport market.

11. In a deposition taken by EPN in Docket Nos. 25004 and 25188, Mr. Dwayne Cunningham explained that as an Access Account Manager at SWBT, he does not need to worry about or get involved with the issue of lack of facilities for DS1 loops since these loops are provisioned and constructed as a matter of course by SWBT. In a manner exactly like the provisioning of POTS service, and unlike DS3 and above facilities where construction charges might apply, Mr. Cunningham does not get involved with DS1 orders since

construction charges never apply and the construction of the facility is a normal part of the provisioning process. The following is an excerpt of Mr. Cunningham's deposition:

Q. Is it fair to say that if they want a simple DS1, they put it into the access service center. If the access service center can go ahead and provision it, like a DS1 they typically can, nobody even needs to tell you about it, right?
A. That's correct.
Q. Do they copy you on that ASR request for the ASC?
A. No.
Q. And that's talking about a DS1, right?
A. Yes.
Q. On larger circuits they will copy you, though, won't they?
A. Only on a DS3 that no facilities are available or an OCN.
Q. So any DS3 that's not readily available and every OCN circuit the access service center will involve you in the customer's order?
A. Yes, for Qwest.
Q. For Qwest. And on those orders for general circuits like that that are not readily available, are DS1s the only circuit that are readily available most of the time?
A. I'm not involved in all the DS1s. I mean --
Q. Most DS1s get handled without your involvement, correct?
A. Yes.
A. Would you repeat the question?
Q. Other than for DS1s, if I understand you correct, you've said the majority of the time there is something needed for the customer's order, some piece of equipment or configuration that doesn't exist that requires you to put a request in through the WALRSS system to NSS?
A. I believe I was speaking of DS3s that were ordered by Qwest that we have facilities on a majority of the cases the facilities are in place, no reconfiguration is required. DS1s I do not get involved with those.
Q. Because they issue automatically, right, for the most part?
A. Yes.
MR. HARTLEY: Object, form.
A. They are a desired due date in Southwestern Bell territory.

12. SWBT has many options to meet its obligation to provision a 4-wire digital UNE loop. In fact, in a large percentage of the time SWBT meets its obligation to provide a 4-wire digital loop by utilizing only two of its wires. The number of wires used to provision the service is not the benchmark for service delivery, rather the amount of bandwidth that can be delivered over the facilities is the real measure of whether the digital loop capability as been delivered. The reason is that although the loop is defined as a 4-wire digital loop, the industry recognizes this loop definition as a loop capable of carrying a data signal at a

bandwidth level of 1.544 mps. Although a CLEC may order a UNE loop as a 4-wire digital loop, what the CLEC is actually ordering as far as the industry is concerned is a facility that is capable of carrying a certain amount of data at a certain speed. The facility ordered is really any facility capable of transmitting data at bandwidth of 1.544mps. How this 1.544 capable facility is delivered is often immaterial within certain industry guidelines.

13. There are a number of available options for SWBT to provision an order for a DS-1 4-wire digital loop. The oldest and most embedded method is the traditional T1C or T1D type of provisioning which utilizes 4-wire copper facilities and requires a repeater to be installed at approximately three thousand feet intervals in the loop plant. This is how a UNE DS1 facility came to be called a "4-wire digital loop," and is the oldest and least cost effective way of delivering the facility. More efficient and effective 1.544mps copper transmission facilities can be provisioned utilizing HDSL technology. SWBT has been utilizing this form of DSL to provision services since the 1980's. (Only with recent competition, however, did the ILEC price fall to a price where the average consumer could enjoy its transport capabilities.) This technology allows the DS1 signal to travel further down the copper transmission facility before a repeater is necessary as well as allowing the transmit and receive wires to be located in close proximity to each other in the cable itself, unlike the T1C and T1D technology that required the transmit and receive copper wires to not touch each other inside the cable sheath. HDSL requires a field repeater in instances where the loop is over 12,000 feet in distance from the originating SWBT wire center versus the traditional T1D and T1C DS1 technology that required a repeater every 3,000 feet.

14. In the case of the HDSL technology, the DSL repeater in the central office does two things. It sends a stronger, more robust data signal down the loop transmission facility or copper wire and divides the signal into smaller bandwidths to be joined at the distant end to deliver an acceptable combined transmission speed of 1.544 mps which equates in the industry to the definition of a 4-wire digital loop. HDSL can be provisioned with two or four wires, depending on the technology used. My understanding is that the preferred method of provisioning a 4-wire digital loop UNE is to use HDSL-2 technology (2 wire HDSL provisioning which utilizes less of the SWBT facilities in the loop plant) if copper facilities are used to install the DS1 UNE loop. Although SWBT is increasingly refusing to provision DS1 UNE loops for CLECs today, the provisioning of this service is easier, more cost effective and uses less SWBT facilities to deploy the service than it has in the past.

15. When utilizing copper, and because HDSL is a form of DSL, much of the conditioning that is necessary for a DS1 UNE loop is the same conditioning utilized for ADSL loops—a UNE product fully defined in Texas. The only difference in the loop types is that HDSL is synchronous which means a facility that is capable of transmitting and receiving data at the same speed, versus an ADSL signal where the transmit channel is slower than the receive channel. Otherwise the DSL technology is the same.

16. Because a DSL signal is capable of providing the 1.544mps worth of bandwidth necessary to provide a DS1 UNE loop much of the provisioning of DSL and the DS1 UNE loop is the same. Bridged taps and load coils must be removed from the copper pairs of each loop and repeaters are regularly placed for loops to transmit and receive the data. Part of the normal conditioning process at SWBT is adding repeater bays in the SWBT central office and in the field, when needed.

17. The other available method of delivery of DS1 UNE loops is over a fiber facility. This requires multiplexing equipment to reduce the signal from a higher speed to the lower, DS1 speed. The smallest configuration is an OC3 capable of transporting three (3) DS3's. Each DS3 can be broken down into 28 DS1s depending on how the multiplexing equipment is configured. This arrangement is utilized to deliver bandwidth to addresses where known users of high capacity services, such as POPs, large businesses and carrier hotels are located. In addition, this arrangement is utilized at points in the loop plant to "send" the signal without repeaters deeper into the loop. Unlike conditioning for copper based DS1 UNE loops, conditioning utilizing fiber facilities may require reconfiguration of the multiplexing equipment or slotting of additional cards or the augmentation of equipment, as requirements of the service demand. Again, SWBT has for years had the necessary systems and people who do this work day in and day out to provision for its customers.

18. Clearly if SBC chooses to provision a DS1 UNE loopthe system is in place to do so, and the well-oiled SWBT system worked well prior to October 7, 2002. Apparently, as far as SBC was concerned, it was working all too well. So in the states where SBC achieved 271 relief, namely, Texas, Oklahoma, Arkansas, Missouri and Kansas, SBC decided to change the rules, with no notice to the companies that would be harmed by that change.

19. During October EPN started to receive notices that no facilities were available, but unlike previous jeopardy notices, EPN was not given an estimated date of delivery but was told to cancel the order. The unilateral change in policy was never explained to EPN. This created confusion, extra conference calls, emails and telephone calls for EPN to flush out "the rest of the story". Even internal folks at SWBT were not sure what was happening, as evidenced by the string of emails attached as **Exhibit A**.

20. Importantly and quite astoundingly, when EPN confronted SWBT about this new policy, SWBT denied in writing that there was a new policy. See November 5th email to Tony Sanna, Manager of Carrier Relations for EPN from Ricci Allen, SBC Account Manager, included in **Exhibit A.**

21. Although SWBT had provisioned over 1,000 requested UNE DS1's in the six months prior to October, 2002 and *in no instance had been denied a UNE due to lack of facilities*, SWBT has consistently taken the position to EPN that there was no "new" policy put into place that could explain SWBT's refusal to provision the requested UNEs.

22. In the month of October, EPN had thirteen (13) customer orders where SWBT refused to provision such orders as DS1 UNE loops. EPN, in an order to maintain the past ubiquitous delivery to its wholesale customers, was forced to order the DS1 UNE loop as a spe-

cial access circuit. An example of such orders is included as **Exhibit B.** SWBT charges an incredibly higher price for special access service than for DS1 UNE loops. In every instance where EPN was forced to order special access, the circuits were constructed as DS1 loops with no additional construction costs to EPN and within the standard DS1 provisioning interval.

23. Clearly, SWBT's position that facilities between the main distribution frame and the customer's premises are not loops when a repeater shelf must be placed or additional conditioning must be performed is inconsistent with SWBT's practice and operations before the current dispute. SWBT has in the past designed its provisioning process to automatically do the work necessary to provision loops for DS1s.

24. During the arbitration hearing in Docket No. 25188, Mr. Waken, an Area Manager of SWBT, explained in his testimony of April 22, 2002, how SWBT's system is set up to automatically tell the SWBT downstream field forces to finish building facilities to its customers utilizing the TIRKS data base. Mr. Waken testified:

Q And I want to point you specifically to Page 42 of that exhibit that I believe Counsel for EPN asked you some questions about. Do you have that page in front of you?
A (Waken) Yes, I do.
Q Mr. Waken, under the figure that's depicted there where it says, "Exhibit 1, Word document" and then it says, "WA Page," do you see that?
A (Waken) Yes.
Q Can you tell the arbitrators what a WA Page means if you know?
A (Waken) Sure. The WA Page is the work authorization portion of what's commonly referred to as the TIRKS Word document. When the customer -- any customer for that matter, whether it's wholesale or retail, issues a service order for a specific service to Southwestern Bell and then that service, if it goes through the special services process as does the unbundled dark fiber UNEs, that information will be passed over to the circuit provisioning center who creates the design, if you will, inside of the TIRKS system. *That work authorization is the authorization from the engineer to the out field forces to go ahead and connect up all of the facilities that are required to make up part of the UNE,* and that WA Page is that work authorization that permits the technician to do their work.

25. SWBT stopped the provisioning train from going down the normal tracks, and implemented new policies and procedures just for DS1 UNE loops that essentially require that train to reverse its path. Operational Support Systems, TIRKS and OSP Engineering practices prior to October 2002 supported the provisioning of all orders for DS1 UNE loops in parity with retail and access orders. EPN has, over the course of the existing Agreement, obtained many DS1 loops to its wholesale customer locations. SWBT has never before returned a UNE loop order for "lack of facilities" (LOF) on the sole basis that additional provisioning is needed to condition the loop for service.

26. This begs us to ask additional questions. May SWBT have different practices and procedures for special access than it does for UNEs? Why were the facilities available under special access with no additional construction charges assessed to EPN but not available as UNEs? Can SWBT call "construction" one thing for special access and then broaden

the definition of "construction" for CLECs ordering UNEs? Is this yet another ploy to keep CLECs out of the wholesale arena?

27. More critically, is this another attempt for SWBT to "meet its numbers" in special access revenue? In the deposition of Mr. Dwayne Cunningham in Docket Nos. 25004 and 25188, Mr. Cunningham, an Account Manager for Special Access Sales at SBC, stated:

> Q. So do you get both a commission paid to you based on the value of the contract and it also counts against your quota in a certain way?
> A. Well, I have a special access quota, which is the amount of special access that is billed to the customer for that year, what their booked revenues are.
> Q. Okay. So the quota is based on what's billed to the customer?
> A. Correct.
> Q. What about collections? Do they factor into it at all?
> A. We look at billed revenue.

28. In order to meet the telecommunications transport needs of the wholesale carrier and large business customer, a CLEC must be able to provision telecommunications services to every location in the carrier's or large business customer's footprint. Logically, this requires that the CLEC have access to a ubiquitous network that covers the entire footprint and has the economy of scope and scale that makes deploying facilities to reach the locations economically feasible. The only carrier with that network is the ILEC, whose network was built using ratepayer dollars during the era when the ILEC had a state sanctioned and guaranteed monopoly, thus ensuring that it would always have customers to use the facilities it deployed and those customers would pay the ILEC rates set by regulators that virtually eliminated any risk of stranded investment. Even for new locations for wholesale and large business customers, SWBT has existing backbone and feeder cables in place and only needs to provision the last portion of cable to service the new location. Thus, the ILEC is the only carrier that can economically provision such facilities because it simply turns up the existing ubiquitous network the ILEC already has placed in the ground.

29. In order for a CLEC to compete for this business, because of the low volume of circuits required to serve individual customers and the large number of locations in each metropolitan area, the CLEC can not serve the wholesale customer without access to UNEs.

30. This market is an important one as data, internet and combined voice, data and long distance services that utilize DS1 level services increase. As demand for DS1 service increases, carriers must add capacity and expand their network. In order to bring new and better services to their customers in Texas and at the same time lower prices, carriers need to reduce their costs. Since a large chunk of their costs are special access fees paid to SWBT (which include costs to pay commission to SWBT sales personnel), it is only logical that the carriers look to CLECs as potential sources of transport supply for the in-

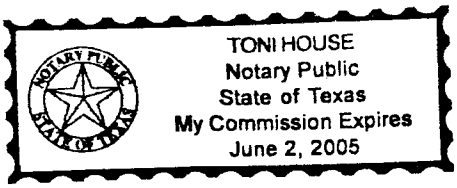
puts that are critical to the viability of the service they provide Texas consumers. The absence of competition in this regard will likely affect the quality of the wholesale carriers service and the price consumers pay for such service in the state of Texas.

31. Since SWBT's October policy change, EPN has been forced to order out of SWBT FCC 73 Special Access tariff in over one out of every ten instances. The cost for the facility is approximately $125.00 per month *more than* that of a UNE. If EPN was to average 2,000 DS1 orders per year (which history documents) and one tenth of the time was forced to pay the higher special access rate, that increase would amount to $25,000 per month for each 2,000 orders. That capital is money that EPN needs to pay for equipment and services, as well as to deploy its own facilities where it is economically feasible, and order other UNEs to provide and maintain customer service. When this amount is added to the costs of filing and litigating a complaint with the Commission, it is obvious that the cost of meeting SWBTs demands is excessive and anti-competitive."

Further the affiant sayeth not.

Pantios Manias
Senior Vice President for Carrier
Relations, Regulatory and Business
Development
El Paso Global Networks

SUBSCRIBED AND SWORN TO BEFORE ME on this 21st day of November, 2002.



Notary Public

EXHIBIT A

EXHIBIT A
MANIAS AFFIDAVIT

From: MCQUEARY JR., DON (SWBT) [dm6040@sbc.com]
Sent: Wednesday, October 30, 2002 7:00 AM
To: Ray, Justin
Cc: ALLEN, RICCI R (SWBT); Sanna, Tony
Subject: RE: SWB DS1 FACILITY JEOPS_10.29.2002

Justin,

The status on both of these orders (C966534DL & C365015DL) is the same-

According to the Outside Plant Engineer there are no facilities existing to the the requested address to carry the service that has been requested on the order.

Don

-----Original Message-----
From: Ray, Justin [mailto:Justin.Ray@elpaso.com]
Sent: Tuesday, October 29, 2002 2:53 PM
To: MCQUEARY JR., DON (SWBT); Ray, Justin
Cc: ALLEN, RICCI R (SWBT); Sanna, Tony
Subject: RE: SWB DS1 FACILITY JEOPS_10.29.2002
Importance: High

Don,
Sorry you weren't able to make the conference call this morning. Per direction from Ricci, I'm including two additional facility JEOPs for your review. Please follow up with data similar to what was provided late last week. I believe this to be a reasonable request based on the limited volume.

C966534DL
C365015DL

Thanks,
JR

-----Original Message-----
From: MCQUEARY JR., DON (SWBT) [mailto:dm6040@sbc.com]
Sent: Monday, October 28, 2002 10:28 AM
To: justin.ray@elpaso.com

Cc: ALLEN, RICCI R (SWBT); tony.sanna@elpaso.com
Subject: FW: SWB DS1 FACILITY JEOPS_10.22.2002.xls
Importance: High

Justin,

I have added my notes to the spreadsheet. It will be difficult to do investigation such as I have provided on a regular basis.

Please let me know your thoughts via e-mail. I will be unavailable for tomorrow's call.

Don

-----Original Message-----
From: Ray, Justin [mailto:Justin.Ray@elpaso.com]
Sent: Friday, October 25, 2002 12:11 PM
To: MCQUEARY JR., DON (SWBT); BOOTS, VICKI PENROD (SWBT)
Cc: Ray, Justin; CONWAY, CANDY R (SWBT); ALLEN, RICCI R (SWBT); KING, CHARITY (SWBT); MASON, JANET M (SWBT); Sanna, Tony; Murrah, Nancy; Meyer,
Terrie; Meyer, Terrie
Subject: RE: SWB DS1 FACILITY JEOPS_10.22.2002.xls
Importance: High

Don,
I do agree that Tony Sanna will be your point for the overall issue, however, I am running the lead on the individual orders, so please respond to me as well with the details.

See attached

Thanks,
Justin Ray
El Paso Global Networks
Provisioning Manager
Desk: 713.420.4053
Mobile: 713.823.1560

-----Original Message-----
From: MCQUEARY JR., DON (SWBT) [mailto:dm6040@sbc.com]
Sent: Friday, October 25, 2002 11:28 AM
To: BOOTS, VICKI PENROD (SWBT)

Cc: 'Justin.Ray@elpaso.com'; CONWAY, CANDY R (SWBT); ALLEN, RICCI R (SWBT);
KING, CHARITY (SWBT); MASON, JANET M (SWBT)
Subject: RE: SWB DS1 FACILITY JEOPS_10.22.2002.xls

Justin,

Can you send me the files that were on the original e-mail for investigation?

Also, I have been in conversation with Tony Sanna/EPN and Patty Hogue/EPN on these no facility issues. It might be to everyone's advantage if I act as the single point of contact for SWB and EPN can decide who their point person may be.

Thanks,

Don

-----Original Message-----
From: BOOTS, VICKI PENROD (SWBT)
Sent: Friday, October 25, 2002 11:16 AM
To: MCQUEARY JR., DON (SWBT)
Cc: 'Justin.Ray@elpaso.com'; CONWAY, CANDY R (SWBT)
Subject: FW: SWB DS1 FACILITY JEOPS_10.22.2002.xls

Don,
Please get this to someone who can research the orders and determine whether the facilities are not available at this time or will be at a later date. I have tried to look in the log notes and there is not any information. You may want to set up a call with Justin and the service manager to review the guidelines and discuss. Thanks, Vicki Boots

-----Original Message-----
From: Ray, Justin [mailto:Justin.Ray@elpaso.com]
Sent: Friday, October 25, 2002 7:10 AM
To: BOOTS, VICKI PENROD (SWBT)
Subject: RE: SWB DS1 FACILITY JEOPS_10.22.2002.xls

Marvelous!

Thanks,
JR

-----Original Message-----
From: BOOTS, VICKI PENROD (SWBT) [mailto:vt0302@sbc.com]
Sent: Thursday, October 24, 2002 5:06 PM
To: 'Ray, Justin'
Subject: RE: SWB DS1 FACILITY JEOPS_10.22.2002.xls

I'll try to get additional details of the facility shortage listed items.
Will get back to you on them 10/25. Vicki Boots
Area Manager Customer Service
Office: 817 212-0509

> -----Original Message-----
> From: Ray, Justin [mailto:Justin.Ray@elpaso.com]
> Sent: Thursday, October 24, 2002 2:54 PM
> To: BOOTS, VICKI PENROD (SWBT)
> Cc: Sanna, Tony; Mabe, Candace; Meyer, Terrie; Mercado, Jessica
> Subject: FW: SWB DS1 FACILITY JEOPS_10.22.2002.xls
> Importance: High
>
> Vicki,
>
> To follow up on the v-mail I just left you...
>
> I have received brief responses from both Janet and Charity
> referencing the attached mail, however, there have been no additional
> details provided regarding these facility shortages. Please interject
> some assistance in finalizing the status of each of these orders ASAP.
> My primary reason for concern is that we have already seen 4 facility
> JEOPs actually close rather than cancel, and we'd like to exhaust all

> avenues prior to going back to our end users with the negative
> responses.
>
> [NOTE: I've attached both the original spreadsheet as well as an
> updated one dated10.24.2002]
>
> Thanks,
> Justin Ray
> El Paso Global Networks
> Provisioning Manager
> Desk: 713.420.4053
> Mobile: 713.823.1560
>
>
>
>
> -----Original Message-----
> From: Ray, Justin
> Sent: Tuesday, October 22, 2002 4:49 PM
> To: Janet Mason (jm9531@sbc.com)
> Cc: Mabe, Candace; Meyer, Terrie; Mercado, Jessica; Atkins, Aimee;
> Mike Davis (md6799@txmail.sbc.com); Sanna, Tony; 'Charity King'
> Subject: SWB DS1 FACILITY JEOPS_10.22.2002.xls
> Importance: High
>
>
> Janet,
>
> To follow up on the v-mail I left you...
> I'm sure you are aware of these issues based on last week's conference
> call, however, I had the team put together several examples of T-1
> SWBT NO FACILITIY orders. We are looking to gain further explanation
> as to specifically what caused these order to go into facility Jeop
> (i.e. bridge taps, repeaters, etc required to complete)
>
> Note: I also gave a courtesy call to Mike Davis in the LOC who
> suggested I funnel all of these through your shop as the single point
> of contact.
>
> Thanks,
> Justin Ray
> El Paso Global Networks
> Provisioning Manager
> Desk: 713.420.4053
> Mobile: 713.823.1560
>

From: ALLEN, RICCI R (SWBT) [ra7845@sbc.com]
Sent: Wednesday, October 30, 2002 11:31 AM
To: Sanna, Tony
Cc: MCQUEARY JR., DON (SWBT)
Subject: RE: T1 no facility issue
Tony,

Due to the complexity of this issue, we would like to set up a call to discuss. We need a representative
from EPN on the line who has a good understanding of this situation. Please let me know your availability, I am available tomorrow or next Tuesday.

Thanks,

Ricci Allen
Account Manager
Industry Markets
SBC/Southwestern Bell
214.464.5962 Voice
214.464.4845 Fax
888.284.5446 Pager
ra7845@sbc.com

-----Original Message-----
From: Sanna, Tony [mailto:Tony.Sanna@elpaso.com]
Sent: Tuesday, October 29, 2002 10:32 AM
To: ALLEN, RICCI R (SWBT)
Subject: RE: T1 no facility issue

Ricci,
So there is no misunderstanding regarding this issue, rather than have another call, just provide the explanation in an email so that it is clear and concise as related to this issue.
Thanks,
Tony

-----Original Message-----
From: ALLEN, RICCI R (SWBT) [mailto:ra7845@sbc.com]
Sent: Tuesday, October 29, 2002 10:04 AM

To: Sanna, Tony; MCQUEARY JR., DON (SWBT)
Subject: RE: T1 no facility issue

Tony,

We need to set up a conference call to discuss this issue. What is your availability tomorrow or Thursday?

Thanks,

Ricci Allen
Account Manager
Industry Markets
SBC/Southwestern Bell
214.464.5962 Voice
214.464.4845 Fax
888.284.5446 Pager
ra7845@sbc.com

-----Original Message-----
From: Sanna, Tony [mailto:Tony.Sanna@elpaso.com]
Sent: Tuesday, October 29, 2002 10:02 AM
To: MCQUEARY JR., DON (SWBT); Sanna, Tony
Cc: ALLEN, RICCI R (SWBT)
Subject: RE: T1 no facility issue
Don,
Please correct any misunderstanding of my recollection of our call in an email to me. I want to be sure I accurately provide the details of this issue to all concerned parties, that is why I documented and sent the below email for your confirmation.
Thanks,
Tony

-----Original Message-----
From: MCQUEARY JR., DON (SWBT)
[mailto:dm6040@sbc.com]
Sent: Monday, October 28, 2002 7:51 PM
To: Sanna, Tony

Cc: ALLEN, RICCI R (SWBT)
Subject: RE: T1 no facility issue

The write-up attached below is false and incorrect. It appears the EPN representative did not understand the conversation nor explanation.

Don

-----Original Message-----
From: Sanna, Tony
[mailto:Tony.Sanna@elpaso.com]
Sent: Monday, October 28, 2002 4:50 PM
To: MCQUEARY JR., DON (SWBT)
Subject: T1 no facility issue
Don,
I want to document our conversation of Thursday, 10-24-02. This will confirm that on 10-15-02 EPN ordered and later obtained a T-1 circuit to 4655 N. Central Expwy, Dallas, TX.. Further, this will confirm that although EPN has properly ordered a second T-1 to the same address, SWBT is refusing to provision a second T-1 and now stating that the second T-1 does not exist (Q3506). You stated however that it shows up as a T-1 in your TIRKS database. You also stated you talked with the SWBT Engineer and he told you he would have to get into a splice case and add a repeater to provision the T-1. Of course, it would not show up as a T-1 in TIRKS unless it had already been conditioned as a T-1, including having repeaters installed as well as the removal of bridge tap and load coils, as needed. If you disagree with this summary in any way, please advise immediately.

Also, as we believe these actions by SWBT are unlawful, we hereby request that you keep all documentation (including electronic data) regarding this matter for future proceedings.

Thanks,
Tony

EXHIBIT B

Local Service Request

Administrative Section
Bill Section
Contact Section
End Of Form

Administrative Section

Next Section End of Form

CCNA	PON	VER	LSRNO	LOCQTY	HTQTY	AN	ATN	SC
ELK	1ULQ03656HSTNP							

DTSENT	DSPTCH	DDD	APPTIMEDDD	DDDO	APPTIMEDDDO	DFDT
10-31-2002-1214PM		11-05-2002				

PROJECT	CHC	REQTYP	ACT	SUP	EXP	AFO	RTR	CC	AENG	NNSP	ONSP	ALBR	SCA	AGAUTH
		AB	N				D	7015						Y

DATED	AUTHNM	PORTTYP	ACTL	AI	APOT	LST	LSO
10-31-2002	PATRICE REES		HSTNTXOVHI	N	01111240711		

TQS	SPEC	NC	PBT	NCI	CHANNEL	SECNCI	RPON	RORD
	UNBLTA	LYT-		04QB9.11		04DS9.1S		

LSPAUTH	LSPAUTHDATE	LSPAUTHNAME	LSPAN	CIC	CUST	LSP

SAN

Bill Section

Next Section Previous Section End of Form

BI1	BAN1	BI2	BAN2	ACNA	EBD	CNO	NRI	BILLNM
L	610-702-0080			Z1Y				EL PASO NETWORKS, LLC

SBILLNM	TE	EBP	BILLCON	BILLCON_TELNO	VTA
	L				

BILLAD_STREET	BILLAD_FLOOR	BILLAD_ROOM	BILLAD_CITY
1001 LOUISIANA			HOUSTON

BILLAD_STATE	BILLAD_ZIP
TX	77002

Contact Section

Next Section Previous Section End of Form

INIT	INIT_TELNO	INIT_EMAIL
PATRICE REES	713-420-4567	PATRICE.REES@ELPASO.COM

INIT_FAXNO	INIT_STREET	INIT_FLOOR	INIT_ROOM	INIT_CITY
713-420-1158	1001 LOUISIANA	25		HOUSTON

INIT_STATE	INIT_ZIP	IMPCON_NAME	IMPCON_TELNO	IMPCON_PAGER	ALTIMPCON_NAME
TX	77002	PATRICE REES	713-420-4567		PATRICE REES

ALTIMPCON_TELNO	ALTIMPCON_PAGER	DSGCON	DRC	DSGCON_TELNO	DSGCON_FAXNO
713-420-4567		PATRICE REES	ELK	713-420-4567	713-420-1158

DSGCON_EMAIL	DSGCON_STREET	DSGCON_FLOOR
EPNDLR@ELPASO.COM	1001 LOUISIANA	25

DSGCON_ROOM	DSGCON_CITY	DSGCON_STATE	DSGCON_ZIP
	HOUSTON	TX	77002

REMARKS

NOTE ACTUAL APOT IS 01DSX240711.DS1 WITH TEST ACCESS.

End User Information

Administrative Section

Next Section Previous Section End of Form

DQTY

Location Access Section

Next Section Previous Section End of Form

LOCNUM	NAME	SAPR	SANO	SASF	SASD
001	BIG CITY		4205		

SASN	SATH	SASS
PINEMONT	DR	

SADLO

116

FLOOR	ROOM	BLDG	CITY	STATE	ZIP
			HOUSTON	TX	77018

LCON	LCON_TELNO	EUMI
ROLAND MACLIN	713-468-0590	

ACC

NOTE, ALT NUMBER FOR LCON IS 832-256-1597.PLEASE CALL AHEAD.

WSOP	CPEMFR	CPEMOD	ERL	IBT	STREET

Inside Wire Section

Next Section Previous Section End of Form

IWO	IWBAN	IWCON	IWCON_TELNO

Bill Section

Next Section Previous Section End of Form

EAN	EATN	FBI	BILLNM	SBILLNM

BILLCON	BILLCON_TELNO	SSN

STREET	FLOOR	ROOM

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CITY | STATE | ZIP | LOCBAN

Disconnect Information Section

Next Section | Previous Section | End of Form

DNUM | DISCNBR | TER | TCOPT | TCTOPRI | TCTOSEC | TCIDPRI | TCNAMEPRI

TCIDSEC | TCNAMESEC | TCPER

REMARKS

Administrative Section
Service Details Section 1
Service Details Section 2
Service Details Section 3
Service Details Section 4
Service Details Section 5
End Of Form

Loop Service

Administrative Section

Next Section | Previous Section | End of Form

LQTY

Service Details Section 1

Next Section | Previous Section | End of Form

LOCNUM	LNUM	LNA	CKR	TSP
001	001	N	05.HCRU.000393..EPGN	

SAN	ECCKT

CFA	SYSTEMID	CABLEID	SHELF	SLOT	RELAYRACK

CHANPAIR	JKCODE	JKNUM	JKPOS	JR	NIDR	IWJK	IWJQ	DISCNBR	TER

TCOPT	TCTOPRI	TCTOSEC	TCIDPRI	TCNAMEPRI	TCIDSEC

TCNAMESEC	TCPER	LEAN	LEATN

REMARKS

DCFA	LCFA

SCFA	VCFA

VCI	VPI	RECCKT	CODESET

Service Details Section 2

Next Section Previous Section End of Form

LOCNUM | LNUM | LNA | CKR | TSP

SAN | ECCKT

CFA | SYSTEMID | CABLEID | SHELF | SLOT | RELAYRACK

CHANPAIR | JKCODE | JKNUM | JKPOS | JR | NIDR | IWJK | IWJQ | DISCNBR | TER

TCOPT | TCTOPRI | TCTOSEC | TCIDPRI | TCNAMEPRI | TCIDSEC

TCNAMESEC | TCPER | LEAN | LEATN

DCFA | LCFA

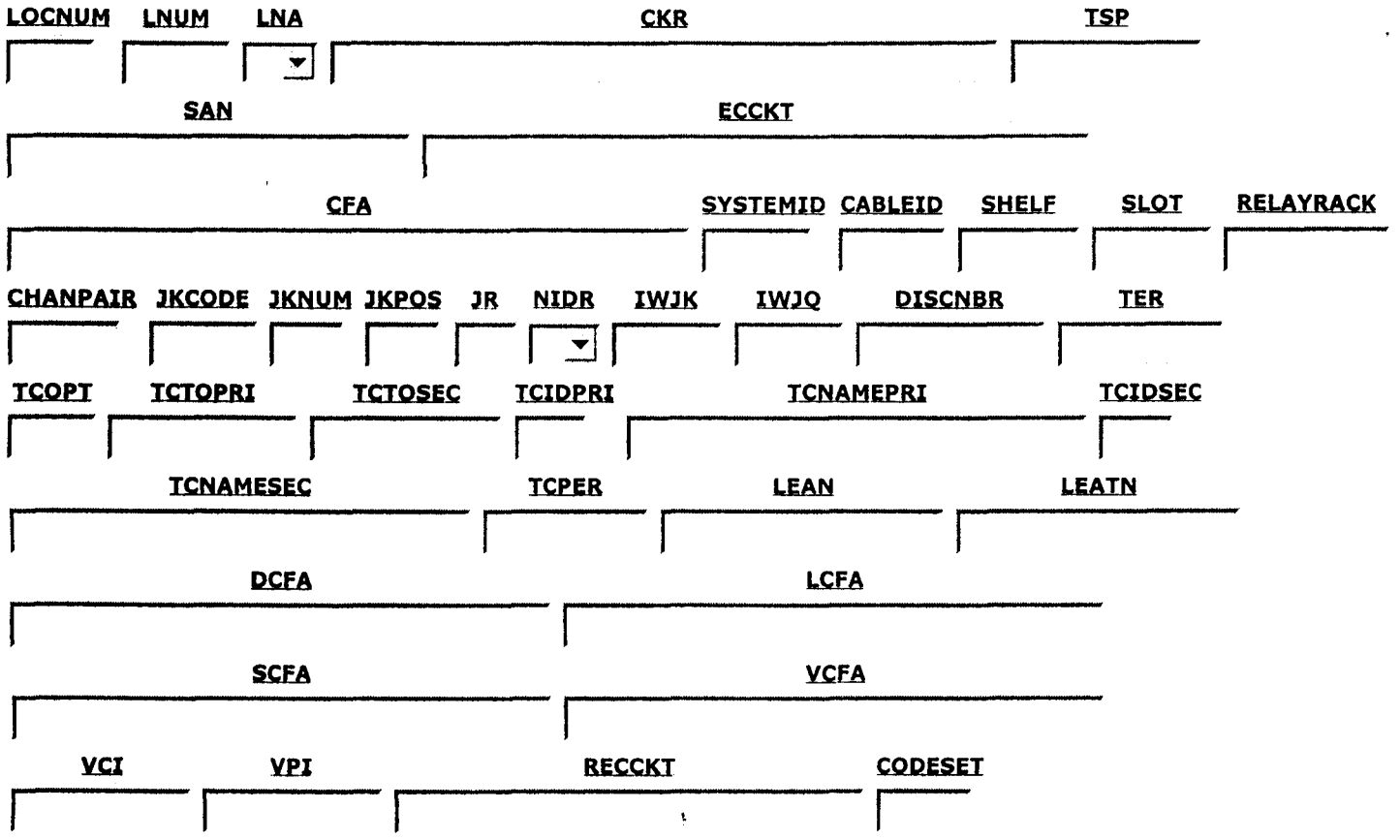
SCFA | VCFA

VCI | VPI | RECCKT | CODESET

Service Details Section 3

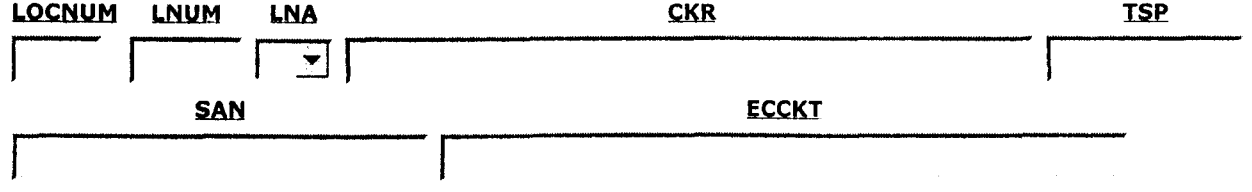
Next Section Previous Section End of Form

120

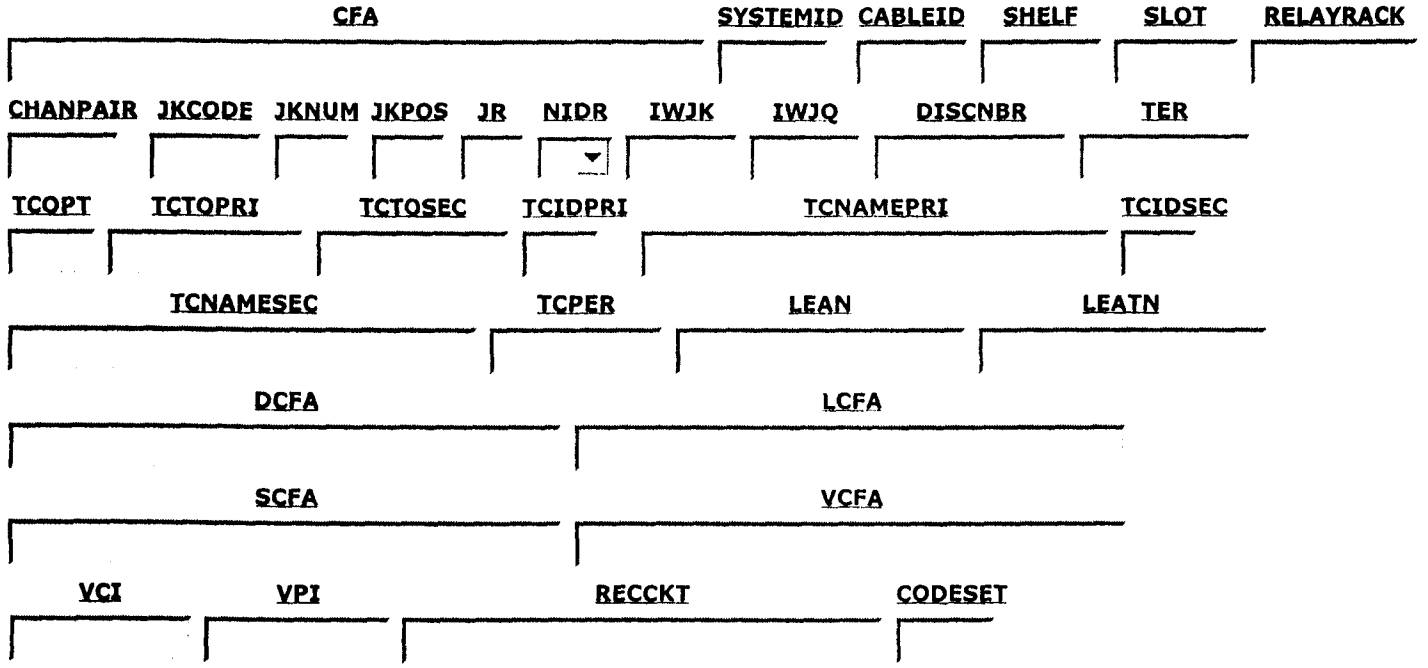


Service Details Section 4

Next Section Previous Section End of Form

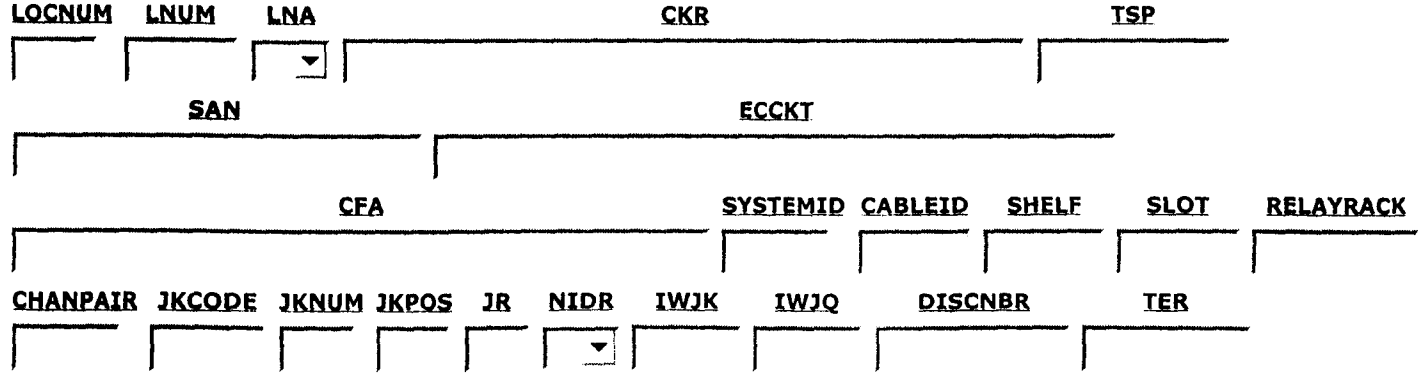


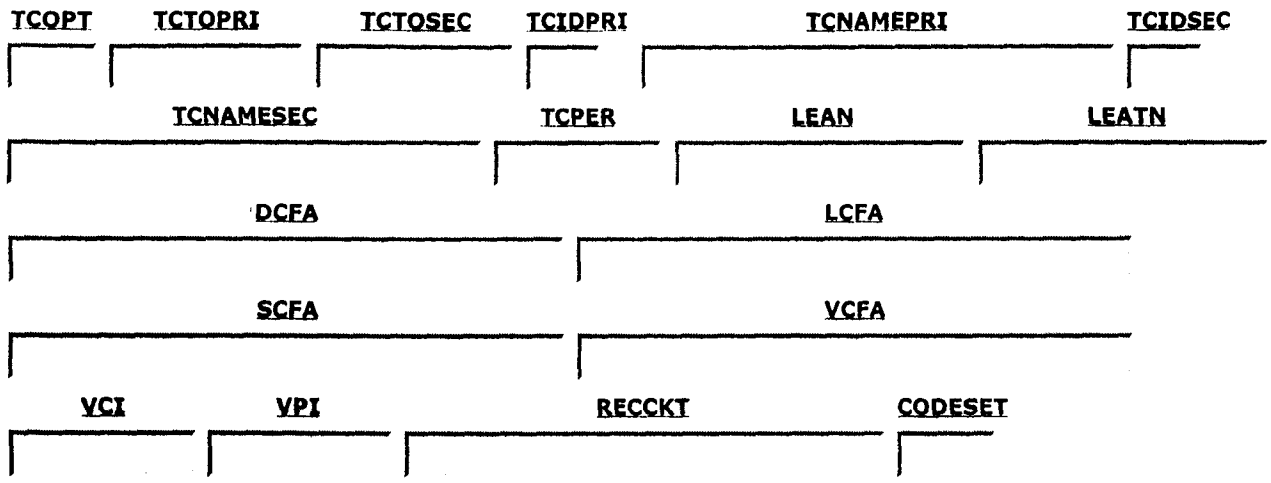
121



Service Details Section 5

Next Section Previous Section End of Form

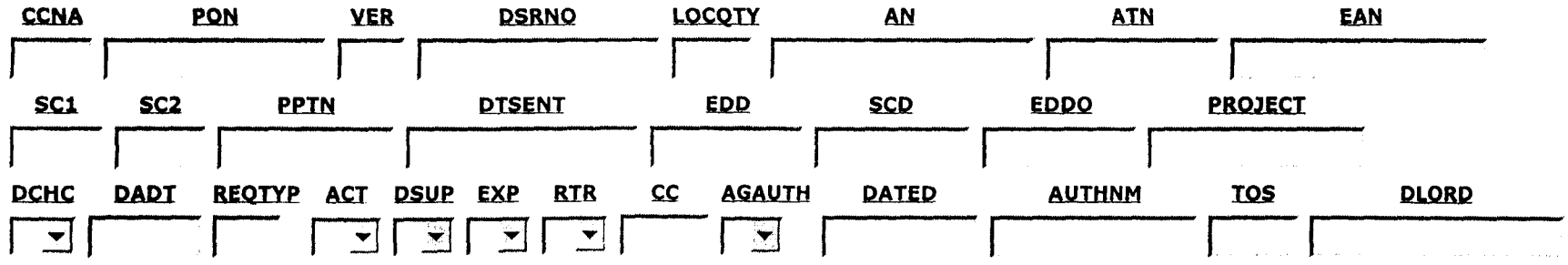




Directory Service Request Form

Administrative Section

Next Section Previous Section End of Form



DAORD DRPON DLRORD DARORD LSPAUTH LSPAUTHDATE

LSPAUTHNAME CUST DLQTY SQTY DDQTY

Bill Section

DBI1 DBAN1 DBI2 DBAN2 ACNA DEBD DBILLNM DSBILLNM

DTE DSTREET DFLOOR DROOM DCITY DSTATE DZIPCODE DBILLCON

DTELNO

Contact Section

DINIT DTELNO DEMAIL DFAXNO

DSTREET DFLOOR DROOMMAILSTOP DCITY DSTATE DZIPCODE

REMARKS

124

Home Jeopardy

NightFire
The provisioning automation company.

Administrative Section
Hunt Group Section
DID Section
Circuit Detail Section
Secloc Section
Directory Section

Jeopardy

Administrative Section

Next Section

CCNA	PON	VER	AN	ATN	LSRNO	ORD
ELK	1ULQ03656HSTNP	01			20021031L09593-01	C716440

CNO	INIT	CDTSENT	REP	ST	IBT	REP_TELNO	RT
		11-04-2002-0148PM					J

CHC	FDT	DD	EBD	BI1	BAN1	BI2	BAN2	ECVER

REASON

ERRORCODE	ERRORTEXT
1P	Facility Shortage

ESDD	AFVR	DSGCON	NSPDSGCON	DESIGN_TELNO	ONSP	TDTR

LORD	CC	COMPDATE
	7015	

Hunt Group Section

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Next Section Previous Section

HUNT GROUP

LOCNUM	HNUM	HID	TLI	HTSEQ

DID Section

Next Section Previous Section

LOCNUM	DSTN	DTLI	DTK	DTGN	DRTI	DTKID	DGOUT	DTNR

Circuit Detail Section

Next Section Previous Section

CIRCUIT DETAIL

LOCNUM	LNUM	LNEX	ECCKT	DSN	LTC	NOTYP	TNS	MATN	CKR	ISPID	CFA	LORD	NPORD	PORTEDNBR	RTI	DISCNBR	TERS	DISCORD

TIE DOWN

LOCNUM	LNUM	SYSTEMID	CABLEID	SHELF	SLOT	RELAYRACK	CHANPAIR	UNIT

FACILITY TRANSMISSION

LOCNUM	LNUM	PGI	DEMARC	OOR	NID

SECLOC SECTION

LOCNUM	LNUM	LNEX	DLCI	RECCKT	LST	RDLCI

Circuit Detail

LOCNUM	LNUM	ERRORCODE	ERRORMESSAGE	ORD	RNEX

Secloc Section

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Next Section Previous Section

LOCNUM	LNUM	LNEX	DLCI	RECCKT	LST	RDLCI

Directory Section

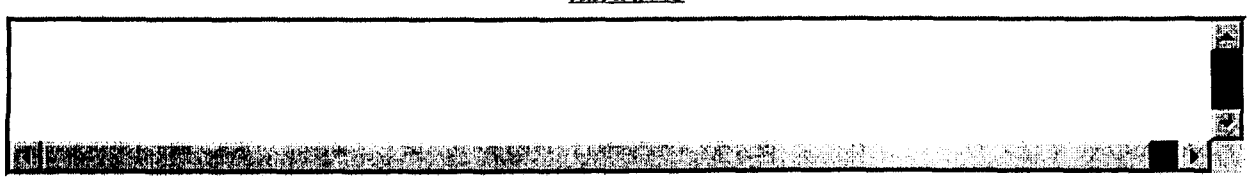
Previous Section

ATN	RT	CC	DOR	DLORD	DAORD

DSRNO	DDA	DINIT	DCHC	DADT	DBI1	DBAN1	DBI2

DBAN2	DLCONTINIT	DLCONTTN	DACONTINIT	DACONTTN	DLQTYR	SQTYR	DDQTYR

REMARKS



NightFire — Access Service Request

Administrative Section

CCNA	PON	VER	ASR NO	SPA	ICSC
WLR	1ULQ03656HSTNPRZ	01			SW70

CC	UNE	D/TSENT	QA	CBD	DDD	FDT	PROJECT
		11-08-2002-0822AM			11-15-2002		

CNO	PPTD	PFPTD	NOR	LUP	BSA	REQTYP	ACT	QSA	WST	LATA
						SD	N	01		

RTR	SUP	AFO	QNAI	TQ	EXP	AENG	ALBR	AGAUTH	DATED	CUST
S	3									

LA	LADATED	LANM

FBA	FNI	CFNI	PSL	PSLI

CKR	UNIT	PIU	PLU
05.HCRU.000393..EPGN	C	100	

LTP	ECCKT	QTY
		1

QTY	BAN	ASG	BIC	BIC TEL	BIC ID	TSC	WSTN
1	610-702-0080						

ACTL	PBT	AI	APOT	RORD	RPON
HSTNTXOVHN2		N	01DSX240711		

CCVN	ASC-EC	TSP	SAN	AFG	SPEC

REMARKS
SUP TO CORRECT NCI CODE AND PLEASE NOTE THAT THIS APOT IS AVAILABLE, BELL ORDER C716440 OUT OF HOUSTON WAS CANCELLED AND THIS APOT SHOULD NOW BE AVAILABLE. PLEASE INSTALL DS1 SERVICE.

Bill Section

BILLNM	SBILLNM	ACNA	TE
WALLER CREEK COMM. INC		WLR	L

EBP	STREET	FLOOR	ROOM	CITY
	1801 N. LAMAR		M	AUSTIN

STATE	ZIP CODE	BILLCON	TEL NO	VTA
TX	78701	LINE COST	512-485-7950	M

VCVTA	IWBAN

NightFire

Access Service Request (Cont.)

Administrative Section

CCNA	PON	VER	ASR NO	SPA	ICSC
WLR	1ULQ03656HSTNPRZ	01			SW70

Contact Section

INIT	TEL NO	INIT FAX NO
PATRICE REES	713-420-4567	713-420-1158

INIT EMAIL
PATRICE.REES@ELPASO.COM

STREET	FLOOR	ROOM	CITY	STATE	ZIP CODE
1001 LOUISIANA	25		HOUSTON	TX	77002

DSGCON	TEL NO	DSG FAX NO
PATRICE REES	713-420-4567	713-420-1158

DSG EMAIL
PATRICE.REES@ELPASO.COM

STREET	DRC	FDRC	FLOOR	ROOM	CITY	STATE
1001 LOUISIANA	FAX		25		HOUSTON	TX

ZIP CODE	MTCE
77002	

IMPCON	TEL NO	D/TREC	TEL NO
PATRICE REES	713-420-4567		

NightFire

Transport Request

Administrative Section

CCNA	PON	VER	ASR NO	SPA	ICSC
WLR	1ULQ03656HSTNPRZ	01			SW70

Circuit Detail

NC	NCI	TLV	SECNCI	SECTLV
HCE-	04QB9.11		04DU9.1SN	

NSIM	SR	S25	ER	SSS	ATN	TRF	MST	HVP	OTC	ISDN SEQ	CKLT	NSL
		NA										

CFAU	CFA	DIR	CPT

SCFA	SDIR	SECLOC	MUXLOC
		E	

HBAN	PRI ADM	SEC ADM

CLK	NVC	PSPEED	LMP	N/U	ZLG	BSC	ETET

CCEA

SCCEA

GETO	GBTN	GCON	GTEL

CTX TEL	CTX LSTD NM

WACD1	WACD2

REMARKS

NightFire

Service Address Location

Administrative Section

CCNA	PON	VER	ASR NO	SPA	ICSC
WLR	1ULQ03656HSTNPRZ	01			SW70

Address Detail Section

REF NUM	PI	EUNAME	AFT	SAPR	SANO	SASF	SASD
0001		WALLER CREEK COMMUNICATIO			4205		

SASN	SATH	SASS
PINEMONT	DR	

LD1	LV1	LD2	LV2	LD3	LV3

CITY	STATE	ZIP
HOUSTON	TX	77018

AAI

REN	JK CODE	JK NUM	JK POS	JS	SMJK	PCA	SI	SPOT	ICOL
				D					

LCON	ACTEL	AACTEL	ACPGN	ACPPN
ROLAND MACLIN	832-256-1597			

ACC	WKTEL

NightFire — Confirmation Notice Form

Administrative Section

CCNA	PON	VER	ASR NO	SPA	RT	INIT
WLR	1ULQ03656HSTNPRZ	01	0231200040		F	PATRICE REES

ICSC	CD/TSENT	AP REP	AP REP TEL	PROVINT
SW70	11-08-2002-0426PM	BESS GONZALEZ	214-268-9857	

EMAIL	AP DSGCON TEL

APF DSGCON TEL	AP OCO	APF OCO	AP MCO	PIA

APF MCO	PROVINT	PROJECT	CNO	APP
				11-08-2002

DLRD	CDLRD	PTD	DD	EBD	BAN
11-12-2002		11-14-2002	11-15-2002		610 088-8854

SWC	SC	FACTL	NC1	NC	NCI	EC VER	SECLOC
HSTNTXOVDS0						01	

FDLRD	FCDLRD	FPTD	FDD	CIWBAN

ECSPC	FNI	ECAPC	RTI	TNSC

Remarks

REMARKS

Service Section

ECCKT	NHN	REFNUM
28/HCGS/731303//SW/		0001

FCKT	HBAN	NK	MPA

CKR
05.HCRU.000393..EPGN

CKR1	LEGNUM	TRN	TCIC

ORD	FORD	CRO	ASG	SSWC
C182019				HSTNTXOVDS0

TSC	TRKQTY	DTN	EQPDESG	RELAYRACK	UNIT #	FACDESG

FACTYPE	CHANNEL	FCHAN	RTE MI	MISC	MISC

MISC	MISC	MISC	MISC

AFFIDAVIT OF GLENN TAYLOR

COUNTY OF HARRIS §

STATE OF TEXAS §

BEFORE ME, the undersigned authority, on this 15th day of November 2002, personally appeared Glenn Taylor, who, upon being duly sworn, on oath deposed and stated the following facts are true:

1. My name is Glenn Taylor, I am over eighteen (18) years of age and of sound mind. I have been Vice President of Service for Logix Communications since March 6th, 2000. My business address is 2950 N. Loop West #1200, Houston, TX 77092.

2. I have ten years of experience in the telecommunications industry. My current responsibilities include overseeing the provisioning of all customers, maintaining service for existing customers, and staying current on all regulatory issues that impact Logix Communications' ability to service its customers. Previously, I was the Director of Project Managers, overseeing the installation of all new facility-based customers.

3. I am filing this affidavit to describe nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") that led Logix Communications to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. Logix Communications began providing local telephone service in Texas in 1999. Currently, Logix Communications serves approximately 5,200 customers in the state of Texas. In order to provide service to its customers, Logix purchases DS-1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. Logix Communications interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A". Logix is currently provisioning UNE's under the UNE remand.

6. Logix Communications has purchased DS-1 loops from SWBT since June, 1999. On or about October 2002, Logix began noticing a significant increase in the number of its DS-1 loop orders returned by SWBT for "lack of facilities" (LOF).

7. Between January and September 2002, the number of DS-1 loop orders returned by SWBT in Texas was less than 1%. Since October 1, 2002, the number of DS-1 loop orders returned by SWBT in Texas was 12%, a very significant increase for Logix.

8. In response to this tremendous increase in returns for LOF, Logix Communications has made multiple contacts the SWBell Dallas LSC to escalate the installation of our UNE DS1 orders. Briefly here are three of our experiences:

a. Pam Brumley, Provisioner with Logix Communications contacted Herb with Southwestern Bell (SWB) regarding customer order xx441773. Herb, SWB Tech stated the engineer has been out to the customer site and there are no facilities. Betty at SWB Local Service Center (LSC) confirmed that the order needed to be cancelled. Betty at SWB LSC would tell Pam Brumley what would happen next. Pam Brumley escalated to her manager, Faith Riojas, Manager at Logix Communications. Faith spoke with Larry at SWB LSC she was informed that SWB would not provide facilities at this location. Faith escalated to Rhonda McGilber, Director of Customer Provisioning at Logix. Rhonda spoke with Marisa Wesley, SWB LSC manager and Sherial Jameson, SWB Area Manager and both informed Rhonda McGilber that it is not cost effective for SWB to build out when circuits are ordered through the LSC. Cheri also informed Rhonda with Logix that if she would order through BDS Telis (Access Service) SWBell would build out facilities to provide DS1 service.

b. Brenda Medina, Provisioner with Logix Communications contacted Carol with SBC regarding customer order xx770419. Carol with SWB LSC informed Brenda that the service was denied from SWB because they are not doing any build outs for UNE DS1's. Brenda Medina was referred to speak with an account manager at SWB. Gene at SWB informed Brenda that SWB would not build new facilities for UNE orders. Brenda Medina escalated to Rhonda McGilber Director of Customer Provisioning at Logix Communications. Rhonda spoke with Becky Johnson and she informed Rhonda that SWB would not build out for UNE customers.

c. Brenda Medina - Provisioner with Logix Communications contacted Frankie at SWB LSC because customer xx43775141 order went into jeopardy status on the day the order the circuit was due. Frankie at SWB stated that because Logix was the customer that Logix did not have any UNE facilities available to complete this order. Brenda Medina escalated to her manager Faith Riojas, manager at Logix Communications. Faith was informed that the order was in jeopardy because there were either busy/defective/incorrect/incompatible facilities. Order placed again, order put in jeopardy again. Rhonda McGilber spoke with Jackie at SWB LSC, no facilities and SWB will not build out.

9. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 loops, Logix Communications will be irrevocably harmed. SWBT's new policy has and will have a devastating impact on Logix's ability to provide

service to new and current customers in the Texas because Logix Communications will have to either cancel its order(s) indefinitely until "facilities" are available or order SWBT's higher priced special access service.

10. Under the first option, Logix Communications would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. Option two is equally unacceptable because it means Logix will be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 loop, seriously altering Logix's business plan and the nature of its network and hurting Logix's ability to provide competitively-priced services in the market.

11. Under either option Logix Communications standing in the marketplace with its competitors would be materially diminished. Under the first option, the customer would question whether Logix could deliver service in a timely fashion. Under the second option, the customer might be inclined to find another carrier, probably SWBT, since the customer would generally not be inclined to pay special access rates to a CLEC when it could obtain those same rates from SWBT.

12. Effective November 11, 2002 Logix Communications began placing DS-1 loop orders using option 2 above. This is the only option that will allow Logix to uphold its reputation in the market place, and deliver service in a timely manner. It is not, however, a solution to this problem. Logix Communications is entitled under its interconnection agreement to order DS-1 UNE loops on a parity basis with SWBT's special access and other retail DS-1 services. Logix Communications respectfully requests refunds for any additional costs or contract liabilities associated with ordering DS-1 loops via special access due to SWB's refusal to install UNE T1 loops."

FURTHER AFFIANT SAYETH NOT.

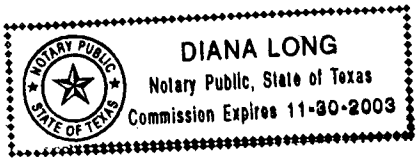
Name G L Hunt

Title Vice President of Service

Sworn and Subscribed to before me this 19th day of NOVEMBER, 2002, to certify which witness my hand.

Notary Public in and for the State of Diana Long

My Commission expires on:



AFFIDAVIT OF DONALD R. SARCHET

STATE OF TEXAS)

COUNTY OF LUBBOCK)

BEFORE ME, the undersigned authority, on this 18th day of November 2002, personally appeared Donald R. Sarchet, who, upon being duly sworn, on oath deposed and stated the following facts are true:

"1. My name is Donald R. Sarchet. I am over eighteen (18) years of age and of sound mind. I have been Vice President of CLEC Services for NTS Communications, Inc. ("NTS") since August, 2000. My business address is 5307 West Loop 289, Lubbock, Texas, 79414.

2. I have thirty-six (36) years of experience in the telecommunications industry. My current responsibilities include direction of CLEC Services including provisioning with Southwestern Bell Telephone Company in Texas. Previously, I was a Vice President Operations for ionex communications and Advance Telecommunications Group in Dallas, Texas as well as a variety of other industry positions. I have a bachelors degree from LeTourneau University, 1998.

3. I am filing this affidavit to describe nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") that led NTS to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. NTS began providing local telephone service in Texas in 1999. Currently, NTS serves approximately 45,000 customers in the state. In order to provide service to its customers, NTS purchases DS-1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. NTS's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A."

6. NTS has purchased DS-1 loops from SWBT since October, 1999. On or about October 7, 2002, NTS began noticing a significant increase in the number of its DS-1 loops orders returned by SWBT for "lack of facilities" (LOF).

7. Prior to October 7, 2002 cancellation rate for our DS1 UNE loop orders was 0%. Between October 7, 2002 and November 5, 2002, the number of DS-1 loop orders returned by SWBT in Texas was five, a significant increase in the number of returned DS-1 loop orders due to LOF.

7. NTS was notified by Don McQuery Area Service Manager at SWBT that SWBT intended to cancel all DS-1 orders which were returned due to LOF. This information was communicated to me by Brandon Perry, CLEC Coordinator Supervisor. On October 9, 2002, I sent an email to Bruce Solis, Account Manager – Select Accounts at SWBT to ask if the information he received was correct. Solis replied confirming that SWBT would cancel all DS-1 orders returned for "no facilities." See Exhibit A.

8. I responded that SWBT's failure to provision these "no facilities" DS-1 loops was anticompetitive. Solis responded to Daniel Wheeler, NTS General Counsel asking him for contractual language that supported NTS' positions that SWBT was engaging in anticompetitive conduct. Wheeler responded citing section 2.4.1 of Attachment 6 of the T2A and 47 U.S.C. section 251(c)(2) and (3) stating that SWBT was obligated to provide DS-1 loops to NTS under the same terms and conditions that it provided those services to its own customers. See Exhibit A.

9. Solis responded On October 23, 2002, disputing NTS' interpretation, stating that SWBT was only obligated to provide access to its "existing network" citing the 8th Circuit Court of Appeals decision in Iowa Board of Utilities v. FCC. See Exhibit A.

10. On November 6, 2002, Wheeler responded asking for confirmation from SWBT's Vice President level if Solis' response of October 23, was in fact SWBT's position on the matter. See Exhibit A. Solis responded on November 7, 2002, detailing how SWBT would work DS-1 orders. This detailed policy or guideline was derived from SWBT's Construction and Engineering Methods and Procedures for provisioning UNEs which Solis advised were subject to modification. See Exhibit A.

11. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 loops, NTS will be irrevocably harmed. SWBT's new policy has and will have a devastating impact on NTS's ability to provide service to new and current customers in the Texas because NTS will have to either cancel its order(s) indefinitely until "facilities" are available or order SWBT's higher priced special access service.

12. Under the first option, NTS would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. Option two is equally unacceptable because it means NTS will be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 UNE loop, seriously altering NTS's business plan and the nature of its network and hurting NTS's ability to provide competitively-priced services in the market.

13. Under either option NTS's standing in the marketplace with its competitors would be materially diminished. Under the first option, the customer would question whether NTS could deliver service in a timely fashion. Under the second option, the customer might be inclined to find another carrier, probably SWBT, since the customer would generally not be inclined to pay special access rates to a CLEC when it could obtain those same rates from SWBT.

14. NTS has been able to order DS-1s, which were returned and canceled for LOF, through SWBT's Access tariff. On October 16, 2002, NTS ordered a Point-to-Point DS-1 loop via the T2A. (SBC order C908388SA). On November 7, 2002, the order was returned and canceled for "no facilities." On November 8, NTS ordered an Access DS-1 (SBC order (C068745) using the same APOT from NTS' collocation with SWBT at SWBT Midland Oxford central office. The order was completed for testing on November 15, 2002."

Further the affiant sayeth not.

Donald R. Sarchet
Vice President – CLEC Services
NTS Communications, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this 18th day of November, 2002.

Notary Public

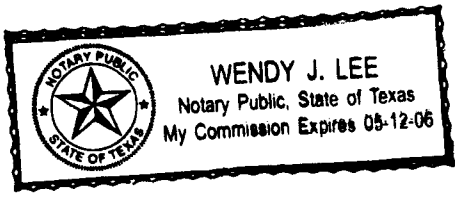


EXHIBIT A
AFFIDAVIT OF DONALD R. SARCHET

Dan,

The intent of this email is to inform you that SWBT's position has not changed and to inform you of recent clarifications made internally within SBC/SWBT to support our existing policy which resulted in the following guidelines derived from Construction and Engineering M&P for provisioning UNE's:

SBC/SWBT will:

1)Continue to conduct simple modifications such as LST's or defective pair recovery to provide the service.

2)Continue to remove bridge tap and/or load coils to provide the service.

3)Continue to add a circuit card to an existing multiplexer, plugs to existing repeater case, and/or cards to an existing pair gain system to provide the service.

However, SBC/SWBT will not construct facilities for UNE's including:

1)Physical construction or "energizing" of copper facilities necessary to provide the service.

2)Turn up of a new pair gain system or premise MUX (e.g. FLM 150) necessary to provide the service.

3)Placement and splicing of a new repeater case or doubler necessary to provide the service.

4)Splicing of an existing repeater case or doubler necessary to provide the service.

Since the above guidelines are taken from internal M&P's, it is important to note that they are subject to modification.

I expect that this helps clarify SWBT's position. If you seek additional information please inform me at your earliest convenience.

Regards,

Bruce Solis
Account Manager - Select Accounts
Four Bell Plaza, 7th Floor
Dallas, TX 75202
work - 214-464-8710
fax - 214-464-5150
email - bs2732@txmail.sbc.com

Effective 9-9-02 I can no longer be reached by pager Please inform your company.

-----Original Message-----
From: Dan Wheeler [mailto:danw@ntscom.com]
Sent: Wednesday, November 06, 2002 3:03 PM
To: SOLIS, BRUCE A (SWBT)
Cc: 'Don Sarchet'; 'Brad Worthington'; HARRIS, JUANITA (Legal); GILMORE, JERRY W (SBC-MSI)
Subject: RE: 4-Wire Digital UNE-Loops

Bruce:

Are you sure that is SWBT's position on this matter?

NTS would like confirmation from your VP - Maria Dillard.

If this matter is not resolved by noon on Friday, NTS will file a complaint with the PUC in Docket 20000.

Daniel

-----Original Message-----
From: SOLIS, BRUCE A (SWBT) [mailto:bs2732@sbc.com]
Sent: Wednesday, October 23, 2002 4:30 PM
To: 'danw@ntscom.com'
Cc: 'Don Sarchet'; 'Brad Worthington'; HARRIS, JUANITA (Legal); SOLIS, BRUCE A (SWBT); GILMORE, JERRY W (SBC-MSI)
Subject: RE: 4-Wire Digital UNE-Loops

Dan,

The key word "Provides" (present tense) supports our position. If these services or network elements are not "currently" in the "existing" network then SWBT is not obligated to build out or create it to accommodate the CLEC's request. In other words, if we are not already providing the requested elements then we have no legal obligation under TA96 to build out additional facilities in order to accommodate the CLECs request. The Eighth Circuit (in Iowa Utilities Board) explicitly has stated "that subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network -- not to a yet unbuilt superior one."

Bruce

-----Original Message-----
From: Dan Wheeler [mailto:danw@ntscom.com]
Sent: Wednesday, October 23, 2002 2:08 PM
To: SOLIS, BRUCE A (SWBT)
Cc: 'Don Sarchet'; 'Brad Worthington'; HARRIS, JUANITA (Legal)
Subject: RE: 4-Wire Digital UNE-Loops

Bruce:

NTS' position is that SWBT's announced policy is anticompetitive. Generally, SWBT is obligated to provide NTS the same level of service it

provides to its own customers. Failure to do so is anticompetitive conduct because it gives SWBT an unfair advantage in the marketplace.

Attachment 6, section 2.4.1, states "...SWBT shall provide the requested elements with all the functionality, and with at least the same quality of performance and operations system support (ordering, provisioning, maintenance, billing and recording), that SWBT provides through its own network to its local exchange service customers receiving equivalent service..."

That is self explanatory. If you will "build out" to provide service for your own customers at no additional cost then you must do it for NTS.

Any other interpretation of the T2A would defeat SWBT's obligations to provide equal services and access under the applicable provisions of the Telecommunications Act of 1996. 47 USC Section 251(c)(2) and (3).

Daniel

-----Original Message-----
From: SOLIS, BRUCE A (SWBT) [mailto:bs2732@sbc.com]
Sent: Friday, October 11, 2002 11:02 AM
To: Daniel Wheeler
Cc: 'Don Sarchet'; Brad Worthington; HARRIS, JUANITA (Legal)
Subject: RE: 4-Wire Digital UNE-Loops

Dan,

Per my vmail, I expect that you will review the contractual obligations of SWBT with regards to building UNE's and acknowledge that SWBT is not being anticompetitive as Don has suggested below. If you believe otherwise, please provide me contractual language supporting NTS' position that SWBT is obligated to build out for UNE's and by not doing so SWBT is being anticompetitive as suggested.

Thanks

Bruce Solis
Account Manager - Select Accounts
Four Bell Plaza, 7th Floor
Dallas, TX 75202
work - 214-464-8710
fax - 214-464-5150
email - bs2732@txmail.sbc.com

Effective 9-9-02 I can no longer be reached by pager Please inform your company.

-----Original Message-----
From: Don Sarchet [mailto:dons@ntscom.com]
Sent: Thursday, October 10, 2002 1:55 PM
To: SOLIS, BRUCE A (SWBT)
Cc: Daniel Wheeler; Brad Worthington
Subject: RE: 4-Wire Digital UNE-Loops

Bruce,

The T2A does state that SBC must provide service equal to that which they provide to their own customers. If the same customer NTS is trying to service were to apply to SBC, SBC would provide that service in a normal fashion whether it required any build or not, and whether the customer wanted an analog loop, digital loop, DS-1, etc. Therefore, SBC should provide that service to NTS for NTS's customer as well. To do less would be anticompetitive.

Don Sarchet
NTS Communications, Inc.
Ph (806) 788-2971
FAX (806) 788-3398
dons@ntscom.com

-----Original Message-----
From: SOLIS, BRUCE A (SWBT) [mailto:bs2732@sbc.com]
Sent: Thursday, October 10, 2002 12:01
To: 'Don Sarchet'
Cc: SOLIS, BRUCE A (SWBT)
Subject: RE: 4-Wire Digital UNE-Loops

Don,

Per your Interconnection Agreement, SWBT has never been obligated to build out for UNE's and won't build out for UNE's. Unfortunately, these processes have been circumvented and our internal departments have realized their mistakes and are moving to correct them. To answer you question regarding 2-wire loops, there is no difference? The information provided to Brandon should have been not just DS1's but rather all UNE's across the board. If you have additional questions or concerns please advise me at your earliest convenience.

Thanks

Bruce

-----Original Message-----
From: Don Sarchet [mailto:dons@ntscom.com]
Sent: Wednesday, October 09, 2002 2:39 PM
To: SOLIS, BRUCE A (SWBT)
Subject: 4-Wire Digital UNE-Loops

Bruce,

I have been notified by Brandon Perry that during the conference call this morning, between NTS and SBC personnel, that Don McQueary asked Brandon to call him after the conference. Brandon called Mr. McQueary as he was asked after the call, and was told that SBC will reject all orders for T1 UNE-Loops where any build must be done, i.e. fiber-MUXing, repeater additions, running new cable, etc. The policy is evidently based on an e-mail form a VP (un-named) at SBC which stated that this was according to

the interconnection agreement. When questioned about when SBC would be sending out an Accessible Letter regarding this change in policy, Mr. McQueary stated that there would be no AL sent out because this was the way it should have been done all along. I have read Attachment 6 - Unbundled Network Elements, and I can find no basis for this change. What's different about a 4-wire digital loop versus a 2-wire analog loop? Is SBC going to make a decision now that they will not provide 2-wire analog loops if they require some type of build to a new area, or into an existing area where there are insufficient facilities? I am very concerned about this policy, and I hope that this is a misunderstanding. Please advise me as soon as possible.

Regards,

Don Sarchet
NTS Communications, Inc.
Ph (806) 788-2971
FAX (806) 788-3398
dons@ntscom.com

AFFIDAVIT OF CHARLES D. LAND, P.E.

STATE OF TEXAS)

COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this 19th day of November 2002, personally appeared Charles D. Land, who, upon being duly sworn, on oath deposed and stated the following facts are true:

"1. My name is Charles D. Land. I am over eighteen (18) years of age and of sound mind. I have been consultant/employee for Tex-Link Communications since 1999. My business address is 3201 Cherry Ridge Drive, Suite D-400, San Antonio, Texas 78230.

2. I have 31 years of experience in the telecommunications industry. My current responsibilities include negotiation of interconnection agreements, reciprocal compensation issues and ongoing relationship with ILECs. I have an Electrical Engineering degree from Virginia Tech and am a registered professional engineer in Texas.

3. I am filing this affidavit to describe nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") that led Tex-Link to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. Tex-Link began providing local telephone service in Texas in 1997. Currently, Tex-Link serves approximately 560 customers in the state. In order to provide service to some of its customers, Tex-Link purchases DS-1 loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. Tex-Link's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement or "T2A."

6. Tex-Link has purchased DS-1 loops from SWBT since early 2002. During 2002 Tex-Link telecommunications service products using UNE T1s, and order volume has been slowly ramping up. In late October, 2002, Tex-Link began noticing a significant increase in the portion of its DS-1 loop orders returned by SWBT for "lack of facilities" (LOF).

7. In the past, most of Tex-Link's orders that were placed into jeopardy by SWBT were ultimately worked. SWBT just needed additional time to make minor facility modifications to work the orders. The difficulty is that the delay on orders placed jeopardy is unpredictable. And an additional problem is that the CLEC must spend a lot of time on the telephone with

Southwestern Bell on each order. Our experience has been that once an order is placed into jeopardy, Bell stops all work on the order. In the past, if Tex-Link made enough phone calls, SWBT would eventually "find" facilities and work the order. SWBT's new policy results in increased order returns due to LOF, causes delays in providing scheduled customer service, results in a substantial increase in manpower requirements to work the order and adds to Tex-Link's costs to serve its customers.

8. In most cases, SWBT's new policy for provisioning results in missed due dates for Tex-Link's customers. With a new customer coming on board, Tex-Link's credibility is impaired when it misses a due date, even if that "miss" is due to Southwestern Bell's failures. In some cases, missing a due date can cause loss of the customer. SWBT's actions of denying an order due to "no facilities" causes at least a one week delay in fulfilling a customer's service request. If the order sits in jeopardy before SWBT decides if it will work the order, even more delays occur.

9. Since October 2002, SWBT has placed into jeopardy three Tex-Link orders for UNE T1 loops due to "no facilities." Because Tex-Link wanted to minimize delays in serving its customer, it re-ordered the service as Special Access. As a result, Tex-Link will incur additional monthly costs of $55, additional non recurring charges of $350 - $650. In addition, Tex-Link will not be able to meet the due date originally promised to the customer. In order to avoid even much greater cost increases than these, Tex-Link must order under five-year contract terms, which means that Tex-Link potentially has a termination liability that would increase its costs even further.

10. In response to the return of Tex-Link's DS1 UNE loop orders for "no facilities," Tex-Link sought out other providers, re-ordered the circuits out of Southwestern Bell's special access tariff or submitted a Bona Fide Request (BFR) for Southwestern Bell to construct the necessary facilities. When Tex-Link sought out other providers following the first several circuit orders returned for LOF, however, it found that there were none. Tex-Link also considered submitting a BFR, and did so in one case. However, the BFR process takes 30 business days at a minimum, a delay that we believed our customer would not tolerate.

11. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 loops, Tex-Link will continue to be irrevocably harmed. SWBT's new policy has and will have a devastating impact on Tex-Link's ability to provide service to new and current customers in the Texas because Tex-Link will continue to experience order delays, will continue to have to devote more employee time to process these orders and will be required to order SWBT's higher priced special access service.

12. Under the first option, Tex-Link will be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. It might be just a few days delay, it might be a 6-week delay for a BFR or it might turn out that UNE facilities will never be available. Option two is equally undesirable because it means Tex-Link will be forced to pay higher recurring and nonrecurring rates for the special access circuit than it would for a UNE DS-1 loop and accept an

early termination liability, seriously altering Tex-Link's business plan and hurting Tex-Link's ability to provide competitively-priced services in the market.

13. Under either option Tex-Link's standing in the marketplace with its competitors will be materially diminished. Under the first option, the customer would question whether Tex-Link could deliver service in a timely fashion. Under the second option, Tex-Link is faced with the unpleasant choice of losing money on each customer, refusing to provide the service, or asking the customer, who has already signed a contract, to agree to pay a higher price (as a practical matter, this isn't really an option)."

Further the affiant sayeth not.

Charles D. Land

Charles D. Land, P.E.
Tex-Link Communications

SUBSCRIBED AND SWORN TO BEFORE ME on this 21st day of November, 2002.

TONI HOUSE
Notary Public
State of Texas
My Commission Expires
June 2, 2005

Toni House

Notary Public

AFFIDAVIT OF NANCY REED KRABILL

STATE OF Texas)

COUNTY OF Travis)

BEFORE ME, the undersigned authority, on this 15th day of November 2002, personally appeared Nancy Reed Krabill, who, upon being duly sworn, on oath deposed and stated the following facts are true:

"1. My name is Nancy Reed Krabill. I am over eighteen (18) years of age and of sound mind. I have been Director – Regulatory and External Affairs for XO Texas, Inc. (f/k/a NEXTLINK Texas, Inc.), "XO" since July 1998. My business address is 2700 Summit Ave. #172, Plano, TX 75074.

2. I have 16 years of experience in the telecommunications industry. My current responsibilities include all industry policy, regulatory, and local exchange carrier relation issues within the Southwestern Bell 5 state service territory. Previously, I was District Manager and Lead Negotiator for AT&T, where I spent 12 years in various regulatory, process management, training, and technical roles. I have Bachelor of Arts, Masters of Arts in Teaching, and Masters of Business Administration degrees from Emory University.

3. I am filing this affidavit to describe the nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops ("DS-1 loops") that led XO to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. XO began providing local telephone service in Texas in 1998. In order to provide service to its customers, XO purchases DS-1 UNE loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. XO's interconnection agreement with SWBT is the one known commonly as the Texas 271 Agreement, or "T2A." XO has amended the agreement to include SWBT's standard UNE Remand language.

6. XO has purchased DS-1 loops from SWBT since December 1998. Although XO builds our own facilities into customer locations when it is economically feasible to do so, the ability to purchase DS-1 loops is critical to our business. XO has not yet seen the dramatic increase in returned DS-1 UNE loop orders for lack of facilities (LOF) that other CLECs have experienced; however, it is extremely concerned about this issue because any increase in the return rate of DS-1 loops would significantly impair XO's ability to serve our customers.

7. In response to learning of this new process from other CLECs, I contacted my account manager, Kenneth Martin at SWBT, requesting a copy of the new process on November 11, 2002, in order to verify what I had heard. Mr. Martin replied on the same day that he had received the email, and would look into the matter; however, I have had no further correspondence from him on this topic as of this writing.

9. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 loops, XO will be irrevocably harmed. SWBT's new policy will have a devastating impact on XO's ability to provide service to new and current customers in Texas because XO will have to either cancel its order(s) indefinitely until "facilities" are available or order SWBT's higher priced special access service.

10. Since XO began monitoring this issue in October, we have been told by Southwestern Bell on at least two occasions that access facilities were available when UNE facilities were not. In the first instance, XO was told that no UNE facilities were available for a T1 on October 8, 2002, but special access facilities were found to be available on October 10. Later, XO was told on October 21, 2002 that no UNE facilities were available for another T1, but special access facilities were found to be available on October 28.

11. Under the first option, XO would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. Option two is equally unacceptable because it means XO will be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 loop, seriously altering XO's business plan and the nature of its network and hurting XO's ability to provide competitively-priced services in the market.

12. Under either option XO's standing in the marketplace with its competitors would be materially diminished. Under the first option, the customer would question whether XO could deliver service in a timely fashion. Under the second option, the customer might be inclined to find another carrier, probably SWBT, since the customer would generally not be inclined to pay special access rates to a CLEC when it could obtain those same rates from SWBT.

13. I have been very disturbed to learn from other CLECs that an order cancelled due to the "no facilities" condition does not show as a "miss" in SWBT's performance measures. On behalf of XO, I have participated in each of the 6-month PM reviews and have long advocated keeping PM 60 as an important measure of SWBT's performance (to my knowledge, SWBT has not advocated the removal of PM 58). When I asked Randy Dysart (SWBT's lead person on PMs) several years ago whether canceled orders would be reported (in either PM 58 or 60), I recall being told that when an order was cancelled as a result of no facilities, it would be reported in a performance measurement, either PM 58 or 60. At this point it would be difficult to reconstruct our precise dialog, however, this has been my understanding of the process for quite some time."

Further the affiant sayeth not.

Nancy Krabill
Director, Regulatory & External
Affairs- South Region
XO Texas, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this 15th day of November, 2002.

TONI HOUSE
Notary Public
State of Texas
My Commission Expires
June 2, 2005

Notary Public

AFFIDAVIT OF KELLY A. GALLAGHER

STATE OF Maryland)

COUNTY OF Howard)

BEFORE ME, the undersigned authority, on this 19th day of November 2002, personally appeared Kelly Gallagher, who, upon being duly sworn, on oath deposed and stated the following facts are true:

"1. My name is Kelly A. Gallagher. I am over eighteen (18) years of age and of sound mind. I have been the Director of Service Delivery for Xspedius Management Co. LLC ("XMC") since September 1, 2002. Previously, I was the Director of Service Delivery for e.spire Communications, Inc. ("e.spire") from July 1999 through August 31, 2002. My business address is 7125 Columbia Gateway Drive, Columbia, MD 21046. XMC is the parent company of Xspedius Management Co. Switched Services, LLC, ("XMCS") which holds a Texas Service Provider Certificate of Operating Authority.

2. I have 14 years of experience in the telecommunications industry. My current responsibilities include handling service delivery matters within the SBC Communications state service territory, including Texas, Oklahoma, Kansas, Arkansas, and Missouri, where XMC's operating affiliates operate. I have a Bachelor of Science degree from the University of Baltimore.

3. I am filing this affidavit to describe the nature and effect of the recent change in Southwestern Bell Telephone Company's ("SWBT") practice for the provisioning of DS-1 UNE loops that led XMCS to file the attached Joint Complaint and Request for Interim Ruling before the Public Utility Commission of Texas.

4. XMCS began providing local telephone service in Texas in September 2002 after acquiring the assets of e.spire. In order to provide service to its customers, XMCS purchases DS-1 UNE loops from SWBT and relies upon SWBT to provision these and other UNEs in a timely and nondiscriminatory manner.

5. XMCS and SWBT entered into an agreement ("MFN Agreement"), which is a sectional MFN into the SWBT/AT&T Agreement for the State of Texas (the "AT&T Provisions"), with the exception of the reciprocal compensation provisions, which derive from the T2A.

6. XMCS has purchased DS-1 UNE loops from SWBT since September 1, 2002. On or about October 18, 2002, XMCS began noticing a significant increase in the number of its DS-1 UNE loops orders returned by SWBT for "lack of facilities" (LOF).

7. For the month of October 2002, 3 out of 18 UNE/EEL circuits or (16.6%) were returned by SWBT in Texas on the grounds that no facilities were available.

8. In response to this increase in order returns due to LOF, I contacted Dave McDonald at SWBT by telephone. He explained that for UNE/EEL service that required construction, SBC would not build additional facilities. I explained that XMCS would be charged higher prices for special access and he explained that if I ordered special access I would most likely have a better chance of delivery.

9. If SWBT does not immediately suspend this new policy and revert to its former policy for providing DS-1 UNE loops, XMCS will be irrevocably harmed. SWBT's new policy has and will have an adverse impact on XMCS's ability to provide service to new and current customers in Texas because XMCS will have to either put on hold its order(s) indefinitely until "facilities" are available, for DS-1 UNE loops, if ever, or order SWBT's higher priced special access service.

10. Under the first option, XMCS would be forced to tell its customer that it does not know when it can fulfill its service commitment because it does not know when it will be able to obtain the necessary facilities from SWBT. Under the new policy, it appears that this postponement would be indefinite. Option two is equally unacceptable because it means XMCS will be forced to pay significantly higher recurring and nonrecurring rates for the special access circuit than it would for a DS-1 UNE loop, seriously altering XMCS's business plan and hurting its ability to provide competitively-priced services in the market. XMCS has built into its business plan the ability to purchase UNEs and EELs because XMCS has a right to do so under our MFN Agreement.

11. Under either option, XMCS's standing in the marketplace with its competitors, and particularly as to SWBT itself, would be materially diminished. Under the first option, the customer would question whether XMCS could deliver service in a timely fashion, or might never receive delivery at all! Under the second option, the customer would not be satisfied with XMCS's pricing and would likely seek another provider that could provide the service on its own network. SWBT would be the carrier with the greatest advantage: at a minimum SWBT could beat our price simply by charging special access pricing directly to the customer.

12. As a final note, it is worth mentioning that, when I reordered the circuits as special access circuits – as I had to do to keep the customer satisfied – two out of three circuits were promptly delivered within ten days."

Further the affiant sayeth not.

Kelly A. Gallagher
Director of Service Delivery

SUBSCRIBED AND SWORN TO BEFORE ME on this 19th day of November, 2002.

Notary Public

STEPHANIE EBERLY
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires 08-01-2004